Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-764

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF FLORIDA, Petitioner,

v.

MICHAEL A. RILEY, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

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Petition for Certiorari filed November 9, 1987
Certiorari granted February 22, 1988

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Date	Item
August 29, 1984	Information for Violation of Florida Comprehensive Drug Abuse and Control Act filed, No. 8401606CFAWS (Fla. 6th Cir. Ct.) (R. 1-2).
December 6, 1984	Motion to Suppress served (motion filed December 20, 1984) (R. 5-6).
December 14, 1984	Exhibits filed in evidence (6 photographs) (R. 3-4).
December 14, 1984	Proceedings on Motion to Suppress. (Transcript filed January 22, 1985) (R. 17-68).
December 19, 1984	Order granting Motion to Suppress entered (R. 9-11).
December 21, 1984	State's Notice of Appeal filed (R. 12).
October 16, 1985	Opinion of the District Court of Appeal of Florida, Second District filed (reversing trial court's decision and certifying question to Supreme Court of Florida).

November 13, 1985	Michael Riley's Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court.
July 9, 1987	Opinion of the Supreme Court of Florida filed (quashing decision of the District Court and remanding for reinstatement of the trial court's suppression order).
July 24, 1987	State's Motion for Rehearing.
September 11, 1987	Order of the Supreme Court of Florida denying State's Motion for Rehearing.

FELONY INFORMATION

The Statute Number of the most serious crime contained herein is 893.13

8/22/84/
WED67

In the Circuit Court for the Sixth Judicial Circuit of Florida, in and for Pasco County

SPRING TERM, in the year of our Lord one thousand nine hundred eighty-four

8401606CFAWS SPN46467	)	
	)	INFORMATION FOR
STATE OF FLORIDA	)	VIOLATION OF
	)	FLORIDA
vs.	)	COMPREHENSIVE
	)	DRUG ABUSE AND
MICHAEL RILEY	)	CONTROL ACT
_____		(2 cts.)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

JAMES T. RUSSELL, State Attorney for the Sixth Judicial Circuit of Florida, in and for Pasco County, prosecuting for the State of Florida, in the said County, under oath, information makes that

MICHAEL RILEY

of the County of Pasco and State of Florida, on the 16th day of August in the year of our Lord, one thousand nine hundred eighty-four in the County and State aforesaid did unlawfully manufacture a certain controlled substance, to-wit: cannabis, commonly known as marijuana; contrary to Chapter 893.13, Florida Statutes, and against the peace and dignity of the State of Florida.

COUNT TWO

And the State Attorney aforesaid, under oath as aforesaid, further information makes that MICHAEL RILEY, of the County of Pasco, State of Florida, on the 16th day of August, in the year of our Lord, one thousand nine hundred eighty-four, in the County and State aforesaid, did unlawfully possess and have in his control a certain controlled substance, to-wit: cannabis, commonly known

as marijuana, which contained more than 20 grams of cannabis; contrary to Chapter 893.13, Florida Statutes, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA)
)
PASCO COUNTY)

Personally appeared before me JAMES T. RUSSELL, the undersigned State Attorney for the Sixth Judicial Circuit of Florida, in and for Pasco County, or his duly designated Assistant State Attorney, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense charged; hence this information is filed in good faith in

instituting this prosecution, and that testimony was received under oath from a material witness or witnesses.

/s/
Designated Assistant
State Attorney for the Sixth
Judicial Circuit of the State
of Florida, prosecuting for
said State

SWORN TO AND SUBSCRIBED before me this 28th day of August A.D. 1988.

(SEAL)

/s/
Notary Public

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL
CIRCUIT OF THE STATE
OF FLORIDA, IN AND FOR
PASCO COUNTY

8401606CFAWS

STATE OF FLORIDA)

vs.)

MICHAEL A. RILEY)

MOTION TO SUPPRESS

COMES NOW the Defendant, MICHAEL A. RILEY, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure and hereby moves this Honorable Court for an Order suppressing all quantities of marijuana seized from the defendant or his residence on August 16, 1984 and as grounds therefor would allege:

1. That on August 16, 1984 officers of the Pasco County Sheriff's Department

secured a search warrant for the residence of the defendant.

2. Pursuant to the execution of the search warrant several quantities of marijuana were seized from the defendant's residence and property.

3. Prior to securing said search warrant, Deputy Robert Longworth, Pasco County Sheriff's Department, received information that marijuana was growing on the defendant's property.

4. Deputy Robert Longworth attempted to view marijuana from the roadway surrounding the defendant's property but could only see a greenhouse behind the defendant's trailer and could not tell what was growing within said greehouse [sic].

5. Officers of the Pasco County Sheriff's Department then flew a helicopter and hovering over the defendant's greenhouse, then attempted to view what was growing in

said greenhouse through openings in the roof of said greenhouse.

6. Based on testimony that the officers stated they could observe marijuana growing through the openings in the roof of the greenhouse, a search warrant was secured.

7. There was no probable cause for issuance of said search warrant.

8. It was impossible for the officers of the Pasco County Sheriff's Department to have a reasonable belief that marijuana was growing at the defendant's residence.

9. The above procedures used by the Pasco County Sheriff's Department in attempting to collect information concerning the possession of marijuana by the defendant intruded upon an area in which the defendant had a reasonable expectation of privacy and the defendant's constitutional rights.

10. Any marijuana seized from the defendant's residence was seized illegally and in violation of the defendant's rights under the United States Constitution and the Laws of the State of Florida.

WHEREFORE, the defendant moves this Honorable Court for an Order suppressing any and all marijuana seized from the defendant or from the defendant's residence.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, 7530 Little Road, New Port Richey, Florida, by personal service, this 6th day of December, 1984.

/s/ Marc Salton
MARC H. SALTON
4911 C.R. 54
New Port Richey, FL 33552
(813) 842-2412

IN THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR PASCO COUNTY

STATE OF FLORIDA Plaintiff, vs. MICHAEL A. RILEY Defendant.	CASE NO. 840160CFAWS

PROCEEDINGS:	MOTION TO SUPPRESS
BEFORE:	Honorable W. Lowell Bray, Jr. Circuit Judge Sixth Judicial Circuit
DATE:	December 19 [semble, sic][14], 1984
PLACE:	Pasco County Government Center 7530 Little Road New Port Richey, Florida
REPORTED BY:	Mary A. Fortner Deputy Official Court Reporter Notary Public State of Florida at Large

APPEARANCES:

Ellen Condon, Esquire
Assistant State Attorney
New Port Richey, Florida
Appearing on behalf of
State of Florida

Marc Salton, Esquire
4911 C.R. 54
New Port Richey, Florida
Appearing on behalf of
Defendant

ALSO PRESENT:

Michael A. Riley,
Defendant

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PROCEEDINGS

THE COURT: State versus Michael A. Riley, 8401606, and this is a Motion to Suppress. Ready?

MR. SALTON: Not until Detective Longworth gets here, I'm not.

THE COURT: Okay. We'll wait a couple more minutes. Is there any chance of the State and the Defense agreeing on some, any, all or most of the facts? We agreed there was a helicopter out there?

MISS CONDON: Yeah, it depends on what.

THE COURT: Pick facts that you think is most important.

MR. SALTON: The only thing, as far as Detective Longworth is, he, apparently, received a tip that there was marijuana growing on my client's property. He went out to investigate that and attempted to see if he could observe any marijuana growing

from the road next to my client's trailer in the back, but could not see what was growing inside the greenhouse.

Consequently, he went to Gell and they went with the helicopter.

MISS CONDON: Didn't he see plants, which he said were consistent with marijuana plants?

MR. SALTON: I thought he just said he saw plants and he couldn't tell what they were.

[*3]

MISS CONDON: I guess, we better get him here.

THE COURT: Is there going to be an argument that the tip alone is enough for the warrant? I think it wasn't even used.

MISS CONDON: That what, the tip?

THE COURT: The tip?

MISS CONDON: No. That was not even a part of --

MR. SALTON: No. That's not in issue.

THE COURT: Okay.

MR. SALTON: They say Longworth is on his way. We can start with Gell and take them in order, but, apparently, he's saying he's never gotten a subpoena. That's always a problem I wonder about, when you subpoena everybody for Friday and either the trial or something doesn't go later in the week. I know, I have never resubpoenaed people and I don't think the State does either. I just tell them --

MISS CONDON: We don't for trial subpoenas.

MR. SALTON: This was a subpoena for trial.

MISS CONDON: For a motion. I mean, I got notice of hearing for a Motion to Suppress at 9:00 A.M. on Monday morning. Is that what you subpoenaed him for?

MR. SALTON: I just subpoenaed him for court for 9:00, A.M. At that point in time, it was still on the calender, of course, so I made a representation at that

[*4]

time that it would be dispositive of the case.

MISS CONDON: Did you resubpoena them for today?

MR. SALTON: No.

MISS CONDON: That's probably what happened. You know, trial subpoenas usually stay good for the week.

MR. SALTON: That's what I told them on Monday, that this subpoena was good for a week.

MISS CONDON: But, it was for a motion. You weren't subpoenaing them for a trial?

MR. SALTON: Yes. I was.

MISS CONDON: In fact, you indicated this was going to trial.

MR. SALTON: But, when I issued the subpoena, I was subpoenaing them for trial, is what I was doing. Either way, we can start with Gell.

THE COURT: If you are ready to go, I'm ready to hear it.

MR. SALTON: I'm just going to have Officer Rossmeissl turn over some photographs to the clerk, so that they can be used during my questioning of Detective Gell.

THEREUPON,

KURT A. GELL

the witness therein, first being duly sworn, was examined

[*5]

and testified as follows:

DIRECT EXAMINATION

BY MR. SALTON:

Q State your name, please?

A Kurt A. Gell.

Q And your occupation?

A Deputy Sheriff, Pasco County Sheriff's office.

Q Did you get involved in the case, State of Florida versus Michael Riley?

A Yes. I did.

Q How did you get involved in that case?

A I received information from Deputy Longworth that there was a possible drug violation occurring out at Moon Lake.

Q And what did he tell you he had done in regards to that?

A He said he went and tried to locate the location where it was at and wanted me to go out there with him.

We went out and located the residence.

Q And did you locate the residence?

A Yes.

Q And what did the residence consist of?

A Acreage with a trailer and some buildings behind it.

Q And at the point in time that you located the

[*6]

residence, were you attempting to see if you could observe any marijuana growing in and about that residence?

A Yes. There were.

Q Where did you position yourself to attempt to observe any marijuana?

A Out on the road.

Q This would be the road that runs in front of the trailer?

A Yes. Correct.

Q It's correct that that property was fenced, was it not?

A Yes, sir.

Q And when you attempted to see if you observed any marijuana growing, could you observe any marijuana growing?

A We observed what looked to be a greenhouse at the back of the trailer. It appeared as though large plants were growing in that greenhouse.

Q You couldn't tell what kind of plants they were?

A Not from right there; no, sir.

Q Did you position yourself at different areas on the road to attempt to see?

A Yes, sir.

Q And at no area that you positioned yourself, you could see or identify what was growing in the greenhouse?

[*7]

A No.

Q Now, the greenhouse, was it directly behind the trailer?

A Yes, sir.

Q Within ten, twenty feet of the trailer?

A Yes, sir.

Q Now, there was some coverage on the side of the greenhouse, was there not?

A Correct.

Q What was that?

A It's like a ripple, plastic fiberglass-type material.

Q And was that material that was coverage to the house of the greenhouse, that blocked your view of seeing what was inside?

A Correct.

Q Could you see a roof on the greenhouse?

A From there; no, sir.

Q You don't know whether it was moved or not?

A Correct.

Q Other than along the different areas of the road, did you attempt to position yourself any place else to see if you

could see what was growing in the greenhouse?

A You mean the first time we went out there?

Q The first time?

[*3]

A No.

Q Apparently, there is woods on one side of the property?

A I believe so.

Q Okay. When you were unable to see the greenhouse from the road, what did you do -- or see what was inside the greenhouse from the road, what did you do?

A I contacted our helicopter pilot so we could fly over the area.

Q And did you get in the helicopter?

A Correct.

Q So, you yourself actually flew over the area?

A Correct.

Q And was anybody else in the helicopter besides you and the pilot?

A No.

Q What did you do in regards to flying over the property?

A The pilot was Mike Rock, and we flew over the area. I showed him where the house -- correction, where the trailer was located, and at that point, we circled over the top, could observe the greenhouse at the back of the trailer, part of the roof was missing from this greenhouse. The roof was a white rather than a green, I believe, and part of the roof was missing, and as we circled around from

[*9]

where we couldn't see from the road, one side of the greenhouse was wide opened.

Q The side that was wide opened was just opened field, was it not, or woods, isn't that correct, where the greenhouse was opened, that side was facing -- there was a wooded area?

A I believe so.

Q Did you ever attempt to go on the property next to Mr. Riley's house?

A No. I did not.

Q To see from any adjacent property, you could see what was in the greenhouse?

A No. I didn't.

Q So, you don't know if it was the greenhouse or the side of the greenhouse that did not have -- the portion of the greenhouse did not have a side on it, if that was visible from any adjacent property?

A I never went on somebody elses property.

Q So, you don't know?

A No.

Q How many acres -- do you recall how many acres are out there?

A As far as the defendant's acreage, I don't know how much acreage he has there.

Q Now, when you got over the property with the

[*10]

helicopter, what did you do?

A We circled the top, over the top of the residence, observed the greenhouse and saw that there was several plants, large, that were growing inside. We could observe at that time that there was marijuana growing inside.

Q Now, when you first flew over the house, did you have to drop the helicopter, the altitude of the helicopter?

A We were flying approximately four hundred feet.

Q Did you ever get lower than four hundred feet?

A I don't know. I wasn't paying attention to the height. I was keeping an eye on the trailer and the greenhouse.

Q I'm going to show you what's marked as the photograph that's marked as Exhibit H, and for the record here, we'll call it Defendant's Exhibit A for identification, and ask if you recognize that photograph?

A Yes, sir.

Q Did you take the photograph?

A Yes, sir.

Q Does that accurately depict what you saw on that date?

A Yes, sir.

Q Okay. Now, did you get any lower than that photograph?

A I was taking a couple pictures of it and I'm not

[*11]

really sure with the zoom lens on the camera, so the picture can't depict exactly what height we were in, because I could have taken another picture that could show it closer.

Q My question would be this: Can you see how close the house, the trailer and the greenhouse is to you from that photograph? Did you get any closer than that?

MISS CONDON: I have to object to that question. We don't know what height that photograph was taken from.

BY MR. SALTON:

Q I'm not referring to specific heights. What I'm referring to, did you ever get to a position where the greenhouse and the trailer were closer or bigger than is shown in that picture?

A I would say it was bigger, because I could see down inside and see the plants inside through the openings there is in the roof.

Q Were you using the zoom lens on the camera?

A It wasn't my camera.

Q Did you have the ability with the camera lens to bring in something larger?

A Correct.

Q Through the camera, were you able to see things larger than you were able to see with your naked eye?

A I would believe so.

[*12]

Q At any time, did you shoot the greenhouse from the air with the camera on the largest or the highest setting to make things the largest?

A I'm not really sure if I did or not. I took a couple pictures and we left.

Q You think you cruised over there at four hundred feet?

A Correct.

Q Okay. My question, then, would be: Once you got over the greenhouse, did you lower, did you come closer with the helicopter?

MISS CONDON: I object to that. It's been asked and answered.

MR. SALTON: I don't think he specifically answered that question.

THE COURT: I'll allow the question.

THE WITNESS: I'm not really sure. I was just observing the residence and the greenhouse. If we dropped a hundred feet, I have no idea.

BY MR. SALTON:

Q Well, you came over at a certain level, correct, and you were looking at the ground and the trailer at that level, am I correct?

A Well, when we came in, we were a lot higher than when we circled.

[*13]

Q But, when you were circling it, after you made a circle, did you ever drop to a lower level?

A Not that I know of.

Q Now, were you using a pair of binoculars?

A No.

Q Did you have a pair of binoculars with you?

A No.

Q On this picture, would you tell me through what area you were able to see the marijuana growing?

A What area?

Q Yeah; through the hole in the roof?

A Through the two holes in the roof and then when we were on this side, we

could also see through the open side of the greenhouse.

Q How low did you have to get to see through the open side of the greenhouse?

A Same. Whatever we were at.

Q It would have been a lot lower than what this picture was taken?

A Not necessarily.

Q How many times did you circle the greenhouse?

A I believe twice.

Q Okay. Did you take all the photographs on that date?

A All of them?

[*14]

Q Yeah?

A No.

Q I'm going to show you what's marked as Number A, on the photograph, the Defendant's Exhibit Two For

Identification purposes, and did you take that photograph?

A Yes.

Q Let me just let you peruse the composite and all the photographs that were put into evidence, in possession of Mr. Rossmeissl and ask you if any other of those photographs were taken by you from the air. I'm going to show you the rest of the photographs and ask you if there are any others there that you took from the air.

A No.

Q So, it would be fair to say that you took two photographs from the air?

A Yeah.

Q Now, photograph A, shows the trailer and the greenhouse a little larger; is that correct?

A I would say so.

Q Is that as large as you were ever able to see the trailer and the greenhouse?

A I could see the greenhouse a lot better than this camera saw it.

Q So, are you saying that, even with the zoom lens that would bring it in closer, you saw the trailer and

[*15]

the greenhouse better?

A Yeah.

Q Did you ever get closer to the trailer and the greenhouse depicted in that picture?

A As far as my sight was concerned, I felt that these pictures are not accurate, because, first of all, if they're at the same height, which is what I feel I was at, obviously, I took one with a little bit more powerful lens, I'm not experienced with the camera and a borrowed camera at that.

I just took the pictures so we would have them for whatever we would need for later on.

Q I'm going to show you what's marked as Exhibit Number G, and do you recognize that photograph?

A This photograph?

Q Yes?

A I believe it might have been taken by Detective Longworth?

Q Does that accurately reflect, though, the relationship of the trailer and the greenhouse?

A Yes, sir.

Q Let me show you what's marked as photograph Number B, and ask if that photograph accurately depicts the back area of the residence, as far as the shrubbery and the overgrown brush area?

A The brush and everything, as far as the trailer?

[*16]

of the trailer?

Q Yes?

A I would believe so.

Q I'm going to show you what's been marked as photograph Number P, and ask if that photograph accurately depicts the greenhouse as you observed it on that date?

A On that date?

Q Yes?

A Yes.

Q And would photograph Y,accurately reflect the holes in the roof?

A Those were the holes in the roof.

Q And photograph Z, would that accurately depict the area that the trailer was sitting in? I know it's a far away view of the trailer?

A This here was a picture of the load

that was being taken away from the defendant's house.

Q I'm referring to the trailer in the back?

A That's not the defendant's trailer.

Q Oh, it isn't?

A (Nodded negatively.)

MR. SALTON: That's all the questions I have, Judge.

[*17]

CROSS-EXAMINATION

BY MISS CONDON:

Q Detective Gell, how long have you been a police officer?

A Fourteen and a half years.

Q How long have you been with the Pasco County Sheriff's office?

A Seven and a half years.

Q And prior to that, what law enforcement experience did you have?

A St. Petersburg police officer for seven and a half years.

Q During your experience as a police officer, have you had occasion to observe marijuana plants?

Q Yes. I have.

Q On approximately how many occasions?

A Probably a hundred times.

Q In your experience, have you ever had an occasion to observe marijuana plants from the air?

A Yes. I have.

Q Either in a helicopter or an airplane?

A Yes. I have.

Q How many times?

A Approximately six.

Q You indicated that there was a plastic on a portion

[*18]

of the side or sides of this grown

side. On how many sides was there plastic?

A Two.

Q Does that mean that the other two sides were exposed to view?

A Yes. They were.

Q And, of course, you have indicated that a portion of the roof was not covered with anything; is that correct?

A That's correct.

Q You did not take all of these photographs; is that right?

A That's right.

Q Did you take any of the photographs on the ground?

A No, ma'am.

Q Who took the photographs on the ground?

A I believe Detective Longworth did.

Q Were you present when they were taken?

A I was in the vehicle, but I was not working the camera.

Q You were on the premises while the photographs were being taken?

A You are talking about the ones of the greenhouse?

Q Yes?

A Yes.

Q And you have had a chance to review all those

[*19]

photographs; is that right?

A Yes.

Q To the best of your knowledge, do they accurately depict the way the greenhouse and the residence and the surrounding premises appeared on the day that you served the search warrant.

A I didn't serve the search warrant. Detective Longworth did.

Q All right, but the day that the search warrant was executed on that property,

do those photographs accurately depict what they purport to show?

A Yes, ma'am.

Q When you were in the helicopter, did you get low enough or near enough to the ground in the surrounding premises, the property around the residence to observe what you believe to be, based upon your training and experience, marijuana plants?

A Yes. I did.

Q And what was it about these plants that made you believe that they were, in fact, marijuana plants?

A The coloration that is given off from them, as well as the way they were grown, and the leef [sic] configuration of the plants.

Q And you were able to see that from the helicopter?

A Correct.

[*20]

Q Did you take photographs of these plants and the premises surrounding the house from every angle at which you observed the plants from the helicopter?

A No. I did not.

Q So, would it be fair to say that you had visual observation of the residence, the greenhouse, and the surrounding premises, which are not depicted in these photographs?

A Correct.

MISS CONDON: I have nothing further, at this time.

THE COURT: Anything further?

MR. SALTON: Just one question?

REDIRECT EXAMINATION

BY MR. SALTON:

Q Detective Gell, using Exhibit A, the two sides that did not have covering,

two sides of the greenhouse that did not have covering would have been, at least, in regards to the photograph, if north is on top, would be the east and west sides, hypothetically?

A North would be the top of the photograph?

Q Yeah?

A The two sides that were open would be the east and south sides.

Q Are you saying this side here?

[*21]

A The right-hand side of the photograph and the bottom, between the greenhouse and the trailer were open.

Q So, on Photograph A, it would be the right-hand side of the greenhouse?

A Correct.

Q And is there a clump of shrubbery facing that open side or close to that open side?

A Approximately twenty-five, thirty feet or so.

Q So, you are not saying what's in that greenhouse would be viewable from any adjacent property?

A I didn't look from any adjacent property.

Q You don't know whether it would or it would not?

A Correct.

MR. SALTON: That's all the question, I have.

MISS CONDON: I've got nothing further at this time.

THE COURT: May he be released?

MR. SALTON: Would you mind waiting for a few moments?

THE COURT: You may call your next witness.

MR. SALTON: At this time, I would go

ahead and enter Exhibit Photographs entitled H, A, Y, P, G, and B.

[*22]

THE COURT: Any objections?

MISS CONDON: No objections to these. Judge, I would suggest that all the photographs be admitted, rather than just selectively picking out some. I think, in order for the Court to make an accurate determination, why don't we put them all in?

MR. SALTON: I don't have any problem with it, if you want to go ahead. Some of them aren't relevant to the Motion to Suppress, and I don't see -- I wouldn't put them in.

THE COURT: Take whatever you want and if the State wants to put them all in, we'll let you argue.

MISS CONDON: I would proffer them all, in going through one by one.

THE COURT: Madam Clerk, why don't you take the small piles and mark those and get those taken care of and those will be accepted into evidence.

MR. SALTON: Your Honor, I would call Michael Riley.

THE COURT: All right, sir. Take a seat down there, sir.

THEREUPON,

MICHAEL A. RILEY

the defendant here, being first duly sworn, was examined and testified as follows:

[*23]

DIRECT EXAMINATION

BY MR. SALTON:

Q Mr. Riley, just one question. I'm going to show you a photograph marked Exhibit H, were you residing at that residence?

A Yes.

Q In August of 1984?

A Yes.

Q Just one question. The left-hand portion of that greenhouse, was anything that would have been growing in that greenhouse, was that visible from any adjoining property?

A No.

MR. SALTON: I don't have any other questions of the witness.

THE COURT: Questions?

CROSS-EXAMINATION

BY MISS CONDON:

Q Who was living at the residence with you?

A Cindy Bliton. (Phonetic spelling.)

Q Do you own that property or do you rent it?

A I rent it.

Q Do you have a written lease?

A No.

Q Who owns the property?

[*24]

A Thomas McGinnis.

Q What is the size of the property that you rent from Mr. McGinnis?

A I'm not sure. I believe it is a little over five acres.

Q Did you construct the greenhouse?

A Yes.

Q Have you had the opportunity to examine these photographs?

A Not all of them. Just what was passed across in front of me here.

MISS CONDON: I don't have anything further at this time.

MR. SALTON: I have nothing else, Your Honor.

THE COURT: All right, sir. You may call your next witness.

MR. SALTON: Your Honor, that's all we would call.

THE COURT: Does the State wish to call any?

MISS CONDON: May I have just a moment, please?

THE COURT: Sure, and also, if you want to argue anymore about those other pictures, to them going in, I guess, it's the proper time for you to move them into evidence.

MISS CONDON: If not, I'd move them in.

[*25]

THE COURT: Do you want to argue?

MR. SALTON: There are several that simply show the marijuana truck, the marijuana in a pile, the police officers standing in front of the marijuana. I would just submit, they're not relevant to the questions or the issues that are before this Court on the Motion to Suppress. For

instance, it looks like L, and I would just show the Court, it simply shows some marijuana growing in the greenhouse.

MISS CONDON: Well, maybe I can look through and maybe withdraw some. Judge, there are just a few here, I have three here that depict photographs of the truck with the marijuana loaded onto it and also the police officers, and these are Exhibit X, W, and Z. I would agree they're probably not relevant, since they depict things that were not on the property at the time that Detective Gell made his observations from the air; however, I think the others are relevant because, even though they were taken from the ground, they show in more detail what Detective Gell observed from the air. And his testimony was that he was able to observe closer or larger the marijuana plants than was actually depicted in a few photographs that were actually

taken from the air, and this, of course, gives the Court some

[*26]

idea of what was actually on the ground for him to observe and, furthermore, he testified that his determination, that there was, in fact, marijuana being grown was based partially on the way the plants were being grown and this, of course, shows the Court the manner in which the plants were being cultivated and grown on the property, and so I would offer them for those purposes.

MR. SALTON: Your Honor, the only thing I would suggest, is that as far as the marijuana in the greenhouse, what he saw from the ground, I submit, there is no relevancy as to what he saw from the air, and that's one of the issues in the motion.

THE COURT: Okay. Do you want to state any objection, any specific ones listed there?

MR. SALTON: Yeah. I would.

THE COURT: Don't get the ones she's taken out.

MR. SALTON: Okay. Now, these you didn't want?

MISS CONDON: Yes. I'm just taking out the ones of the truck and the officers, since they were not on the ground.

MR. SALTON: I object to M, K, L, N. O, Q, T, U, B, Double A, Double B, Double C, Double D, Double E, Double F, Double G, Double H, Double I, -- Number I, and J. [*27]

MISS CONDON: Judge, I further add that since, at least, three of the Defense Exhibits clearly show the holes in the roof, that those exhibits are relevant, because they show what can be seen through the holes, what is the actual inside, and, further, there was testimony that only two sides of the shed or greenhouse were covered and

these photographs also show that there are two exposed sides and, of course, there are photographs that I'm offering into evidence also to show what is visible through the sides, as well as through the roof.

THE COURT: Okay. I'll except [sic] them into evidence. The probative value of some of them, I think, is fairly small, but we'll except them for purposes of the hearing, anyway. Anything further?

MISS CONDON: No, Your Honor.

MR. SALTON: I have no other rebuttal.

THE COURT: All right, sir, do you wish to argue?

MR. SALTON: I think those witnesses want to leave, some of them have been up all night. I have no objection, if you want to release them.

If the Court pleases, and I will argue at this point. There are two issues that

I think the Court has to reach in this case. The first is the question

[*28]

of whether Mr. Riley had an expectation of privacy in the area of his greenhouse and what was growing in that greenhouse. And, I think, the Court has to reach that issue first. And the second issue would be whether or not the acts of the police officers in any way violated my client's Constitutional rights to that expectation of privacy.

First, in regards to the question of the expectation of privacy. Recently what has been developed is what is called the "open field" doctrine. And the Supreme Court of the United States recently kind of reiterated the "open field" doctrine in the case of Oliver versus United States. It's found at 104, Supreme Court, 1735.

Now, we find this case cited in many of the other lower court cases when they talk about the "open field" doctrine, and basically, in that case, the Court not affirmed, but kind of reiterated and give its stamp of approval of an earlier Supreme Court case called Hester versus State. But, the point in Oliver, and I want to read to the Court, it says basically, "An individual may not legitimately demand privacy for actions conducted out of doors and fields except in the area immediately surrounding the home."

And that particular language is used now to make

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a distinction between areas in open fields or open areas that are not immediately surrounding the home, and the ones that are surrounding the home, to distinguish

where this expectation of privacy should begin.

And, with that in mind, I would cite to the Court the case of State versus Rowe, which is 422, Southern Second, 75. This is a Second District Court of Appeals. Here, in Rowe, the defendant had a back yard surrounded by a chain link fence and there was marijuana growing in his back yard. The police went to an adjacent property, not on the defendant's, and with the use of binoculars, they were able to see the marijuana growing in the middle of the defendant's vegetable garden. He had it in the field, but surrounded by a vegetable garden.

The Court says the criteria they must decide is whether or not the defendant manifested an actual expectation of privacy. And I'll just read briefly for the Court and they said, "In the instant case, we

think appellee manifested a comparable expectation of privacy, which must be preserved. As in Richard, the existence of the chain link fence was indicium of a desire for privacy. Moreover, the marijuana was planted in the midst of a vegetable garden."

[*30]

So, in this case, even though the police were able to view the marijuana from the adjoining property with the use of binoculars, they found that here the defendant had an expectation of privacy and the seizure of the marijuana was suppressed.

Probably the next case is one of a more important cases. State versus Rickard, which is found at 420, Southern Second 303. It's Supreme Court of Florida of 1982. Here marijuana plants were also in the defendant's back yard. There was a chain link fence

around the back yard and in this particular case, he had put up a plywood partition blocking the view from one side. The view was not blocked and the marijuana was clearly visible from a citrus grove, which was behind the defendant's home and in this case the police observed the marijuana from that citrus grove.

Here, the Court discussed three times of the "open view" cases. They said, here is what they call a prior valid intrusion. That's the old, and it's called the "open view" case, where the police are in the area, they have a right to be, generally, a home or some other protected area, and find marijuana growing. Then there is what they call the nonintrusion, where both the police officer and the contraband are in a non-Constitutionally protected area, and then the

[*31]

third area is a preintrusion. Here the officer is located out of a protected area and is looking inside.

In the Rickard case, they specifically ruled that because of the defendant putting a chain link fence around the property, that they decided that he also exhibited the expectation of privacy. Here they further pointed out, and this becomes important, and this is a distinction they make. "However, the back yard of the marijuana plants were completely open to view from a privately owned orange grove behind the yard."

Since the owners were up north, people may not have been in the grove often, but the police had been asked to keep an eye on the grove for trespassers, therefore, the defendant's back yard was open to view by the police, possibly grove walkers and meandering neighbors. And the Court,

basically, said he had an expectation of privacy, but he left that open to view.

So, they didn't necessarily find that the police officers going back there were in violation, but the police officers seized the property without a warrant, so they threw out the search. But, I think the reason they're throwing out the search warrant was not where the police were, but the fact that they didn't

[*32]

get a warrant.

The two things that are important here is the fact of the chain link fence showed the defendant did have an expectation of privacy. It's interesting to note that they cite and talk about Harmen versus State, which is 376, Southern Second 634, where they said, "A person who has exhibited an actual expectation of privacy, should be recognized, as long as society finds it

reasonable." And then they went on to cite Huffer versus State, 344 Southern Second, 1332, which actually came out of Pasco County, which was a case that Judge Keough, which he allowed the seizure of marijuana from the defendant's greenhouse. That was subsequently reversed on appeal.

In Huffer, they just talk about the defendant had a hothouse, had lumber, and sheets of plastic. There was a tear in the hothouse through where the police officers observed the marijuana. They had actually gone on the defendant's property to observe the marijuana and they found that here the hothouse was between ten and forth feet from the residence. The plastic sheets, they said, were not used to permit view, but allowed to permit sunlight. It's not located on or near a public thoroughfare. It was behind the defendant's residence. The plants were not

[*33]

visible to the public and they found that, thus, he had that expectation of privacy, and I think it's important, because all those facts are very much similar to here.

Another case that has importance is the DeMontmorency versus State. And this is cited at Supreme Court of Florida, case number 61,179, October 28, 1982. It's Florida Law Weekly, 10/29/82. And in that case, the marijuana was growing on the defendant's property. She had approximately ten acres, but to get to the property, the police had to drive, they went through an open gate into a pasture adjacent to the property in question, then they parked their cars and crossed over the fence into a rough wooded area of the defendant's.

Prior to crossing the fence, they did not see the marijuana growing, but it was seen by them only after travelling a distance

of some 300, feet inside the fence. Subsequently, the marijuana was seized.

The one point in the language that is important here, it said, "The defendant, in the present case, exhibited an actual expectation of privacy by choosing to live in a very secluded area protected by fencing and three large dogs."

If the Court will bear with me for a minute, I'm

[*34]

looking for the exact language and I thought I had it marked, but I can't seem to find it. But the Court said the fact that because there was simply a break in the woods and the marijuana was visible, because of some break in the trees, does not bring that out of the expectation of privacy and I think that's important, because we see here that there was some slats missing from the roof and, though, he exhibited that

expectation of privacy, the fact that there were some slats missing, does not take that out of the realm.

In any event, under Rickard, the mere visibility of the cannabis through the crack in a densely wooded forest does not outweigh the fact that the defendant clearly intended to hide the property in question; that society is willing to honor this objective manifested of an expectation of privacy and was acknowledged by this Court in State versus Morsman, 394 Southern Second 409. That's the point I'm getting at and that's a Supreme Court of Florida 1982.

I think, if you look at these cases, where they find the fact that an individual has an expectation of privacy, because they put a chain link fence around the property or it's in the middle of a vegetable patch or one side is blocked off or it's clearly --

[*35]

it's deep within a wooded area and the only reason you can see it is because of the break of the trees.

And in Huffer, the fact that it's a greenhouse, I think, we clearly can show that the defendant in this case manifested and had that expectation of privacy. So, subsequently, the next question then is, did the actions of the deputies in flying over the defendant's back yard, did that infringe on an area where he had an expectation of privacy?

The first case is Murphy versus State, 413, Southern Second 1268. This is a First District Court of Appeals 1982. Here, a helicopter flew over the property of the defendant and they saw marijuana growing. The hovered to a hundred and fifty feet and used binoculars to identify the

marijuana. They then went and got a search warrant.

In that case, the defendant claimed that the Sheriff was conducting an illegal search by flying over that area. The marijuana was not visible from the road and was within a locked gate. The Court allowed the search with the helicopter, and they applied the "open field" doctrine. And they simply said that there was an area observed.

I say, if the area observed does not constitutionally protect it, then the "open field" doctrine prevails.

[*36]

And here they said, in this particular area, they did not have a reasonable expectation of privacy. The field was clearly visible from neighbors flying over at normal height and the plants were 300, to 450 feet from the appellant's home. So, this clearly

doesn't fall within that curtilage area or as we see in Oliver, the area immediately surrounding the home. So, though, the First District Court of Appeals of Murphy allowed the aerial search, it was clearly distinguishable from our case in terms from the way the marijuana field was not enclosed and it was far from the house.

Next case I would cite, Your Honor, is the Brennan versus State, which is 417, Southern Second 1024. Here, after a tip, the police went to the defendant's residence and walked onto the property and also flew over it with a helicopter and here the marijuana was seen growing along a pathway that connected the plots excuse me, there was a pathway that the marijuana plots were approximately 150 yards away from the home. So, we're talking about 450 feet from the home; but, there were pathways connecting the mobile home to the plot and, again,

the Court said, this is a Second District Court of Appeals, they said that citing Murphy, the First District

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held that, although the premises was protected by a locked gate, the defendant did not have a reasonable expectation of privacy in his marijuana field, which was 300, to 450 feet away from the defendant's home, approximately, the same distance as involved here.

They then found that this area was not constitutionally protected from governmental intrusion and applied the "open field" doctrine. They also indicated they found the observers' altitude was a minor factor but said what is important is the reasonable expectation of privacy that the defendant has in the area.

We also have Castello versus State, which is 442 Southern Second 990, First

District Court of Appeals, November 11, 1983, found at 8, Florida Law Weekly 2653. Here, they spy. They were flying over the area and spotted the marijuana field from approximately a thousand feet and they dropped to 500 feet, and confirmed it. The house was on ten acres.

The case doesn't talk about exactly where in relation to the home the property was or how close the home the marijuana was. They said that the marijuana was not visible from the ground, but it was readily visible from the air and constitutionally, they said, that he had basically, it says here in Murphy, "The appellant did not have a reasonable

[*38]

expectation of privacy in the marijuana patch." The marijuana was spotted in the air and questioned the right to be there, the appellant first saw the marijuana at

an altitude from 1000 feet, and made positive identification from approximately 500 feet. In this circumstance, where the marijuana was clearly visible from the air, did not constitutionally protect Castello, and had no reasonable expectation of privacy in his marijuana patch.

We also have, Your Honor, Masters versus State. This is August 3rd. Really it's July 24th, 1984, found at 9, Florida Law Weekly 1647. Here, the marijuana patch is located but 40 feet from the side of his home. It said, "Since it did not lie within a common fence or enclosure and it was manifestly used for commercial rather than for family or domestic purposes associated with the dwelling, it can not be deemed to have been within the curtilage of the home." And they cite Oliver saying that the area around the home to which the activity of the home life extends was protected and

constitutionally, they found that he didn't have an expectation of privacy, but distinguished the fact that it wasn't fenced or was enclosed.

As you can see in our case, this was not only fenced, but the whole thing is enclosed. We also

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have, which I feel necessary to bring to the Court's attention, the case of Randal versus State. This one is November 2nd, 1984. Very, very recent. Found at 9, Florida Law Weekly 2354. Here the police, after receiving a tip, went over the defendant's residence with the helicopter. It says, "Flying routine patrol altitude, the officers observed the marijuana plants growing in the back yard." Here the defendant had a fence around the back yard, but the marijuana was apparently, not in a greenhouse or not enclosed and they upheld the view

of the marijuana and then certified the question to the Supreme Court.

THE COURT: What DCA was that?

MR. SALTON: This is the Second DCA, and this particular question is certified to the Court: Whether police officers responded to an anonymous tip makes a legally permissible preintrusion, "open view" from the vantage point of the helicopter that travelled at a lawful patrol altitude above an area which an individual has manifested a reasonable expectation of privacy from ground surveillance and the bases of this aerial observation and search warrant justified seizures cited contraband. Very, very close to his situation.

Now, they held in this particular case, the

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police officers acted legally. They did not hover over appellant's property or survey

it from an unreasonably low altitude, nor did they make repeated flights over the property. One of the things they talk about is the fact that it was clear from the air and constitutionally did not have an expectation of privacy. Well, from the air. And they said that he did have a reasonable expectation of privacy, because of the fence he put around it, citing the Rickard, case.

But, the difference between that case and our situation, Your Honor, is not only did Mr. Riley protect that property from the ground viewing, and the pictures will clearly show that there are shrubberies, the place is overgrown and is sort of analogous of the vegetable garden in Rowe; but there were sides on the greenhouse in the area that wasn't sighted and it would clearly show there was shrubbery within a

short distance, trees and undergrowth within a short distance from that.

So, there was no evidence that was visible anywhere from the ground and he also exhibited an intent to shield it from the air by the fact that he had a roof over it. Unfortunately, there was some panels missing from the roof, as the picture shows, but he

[*41]

clearly manifested an intention to have that shielded from normal viewing over the air and it obviously, as can be seen by the picture, would not be viewed by someone flying over normal flight.

The pictures specifically, and I would specifically point out H, and A, Your Honor, show that what is getting to be a very low altitude, you can not see what is in that greenhouse. And, to be able to observe what's in that greenhouse, you're going to

have to get significantly lower than what is in those pictures and if Officer Gell didn't get much lower than those photographs, I don't know how he could see, could identify what's in that greenhouse.

He indicates he is a police officer and has seen marijuana growing. Well, you know, as a defense attorney and a former prosecutor, I have seen marijuana growing also in photographs and have seen evidence, you know, of marijuana plants, and, I would submit, that you are going to have to get very low before you are going to be able to identify what's in those greenhouses. And Mr. Riley clearly showed an expectation of privacy not only from the ground, but from the air and, I think, in light of that, and the cases that I have cited, that they, the police in this case, invaded that expectation of privacy,

[*42]

because it's definitely distinguishable from every case that has allowed an aerial search. That's all.

MISS CONDON: First of all, Judge, regarding the photographs, I think it would be inappropriate to base our argument and decision in this case solely upon those photographs, because, as the Court will recall, Detective Gell indicated that he did not photograph the property from every angle from which he viewed it in the helicopter.

And, further, he was able to get a closer or a larger view of the premises than is actually depicted in those photographs. Therefore, we have to base our argument and our decision here on his testimony, not those photographs alone. And as you will recall, he did indicate that he got within such a range as to be able to observe what appeared to him, based

upon his training and experience, to be marijuana plants.

All those case[s] cited by Mr. Salton so far, which regard or which hold that there has been an unreasonable or illegal intrusion upon the defendant's right of privacy, all regard an intrusion made from the ground; in other words, the person has an expectation of privacy from intrusion on the ground, not from the air.

[*43]

I have prepared a short memorandum here I'd like to give to the Court. And these cases, some of which have been cited by Mr. Salton and others not, but, I think what we need to look at here are those cases that deal specifically with aerial observations, and I have not come across one single case in my research which held there was an unreasonable or illegal

intrusion made by helicopter or an airplane, by means of an aerial observation.

I think this is a very unique and specialized type of situation here, and in determining this case, I think we should look at the cases that deal specifically with aerial observations. And the reason for that is, let me point out the one case that Mr. Salton cited, and that is State versus Rowe, and that is the one involving the vegetable patch or the vegetable garden, in which some marijuana was being grown.

One thing that was not brought out about that case is that the marijuana plants were from two to twelve inches tall and were growing in the middle of a vegetable garden. Well, that's quite different from the situation we have here. If the Court looks at some of those photographs, we can see that these marijuana plants are, at

least, the height of this greenhouse, approximately, some six to twelve feet

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high. This is a lot different than small plants two to twelve inches in height and the Rickard case, although it does talk about a reasonable expectation of privacy, it's different, too, because that involves a back yard and here, of course, we have heard testimony that the defendant's property is some five acres, so we have a different set of circumstances.

And, also in the Rickard case, there was no search warrant that was issued and that was another question that was being considered and another question that the Court had to deal with, is whether that search was legally permissible without a search warrant.

The memorandum that I have submitted, all of these cases, with the exception of

the last paragraph, which refers to a different issue, all of those cases I've cited, the Randal case, the Castello case, the Murphy case the recent case, Diehl versus State, which was just decided in this month's, December 3rd, 1984, all of those case deal with aerial observations by either helicopter or an airplane.

And in each one of them, the Courts have stated that there has been no unreasonable search and held that the aerial observations of either a back yard or acreage was permissible. And in some of the cases,

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the marijuana was even seized without the benefit of the search warrant.

I'm not saying that a person can not have an expectation of privacy in his back yard or even on it's acreage. But, I think you have got to look at the circumstances and what we have got here is a shed or a

greenhouse or whatever you want to call it, which is not affixed to the house, and which has deliberate openings in the roof.

The photographs depict that these openings let in more than just sunlight. There is one here. This is State's Exhibit, Defense Exhibit Six, and here you can see that these plants are very tall and that they reach almost to the full height of the greenhouse, and that there are openings large enough to permit observation of practically, looks like, from this photograph, the entire plant.

And, so as I said, here we've got a situation where we've got a shed, we've got a greenhouse that's got deliberate openings on the top and it's also got only two sides, two of the side are completely exposed to the outside world, whether from adjacent property or from the air, and I think if you look at these cases, as I've

cited in my memorandum, where the Courts have all held that aerial observations are

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made from a lawful vantage point; in other words, law enforcement officers have the legal right to be in the air flying over property and if they are there legally, which they have a right to do, then, anything they see, is not an intrusion; in other words, once they are in the air lawfully over a person's property, and if from that vantage point they can see what they determined to be marijuana, that there is no unreasonable intrusion or search or invasion of the defendant's expectation of privacy. And as I've stated, I have not seen one case yet which has held that an aerial observation is an either illegal or unreasonable intrusion on the right of privacy. All the cases are to the contrary, and I don't think it makes any difference

whether they're growing out in the open field or whether they're in some type of a greenhouse or a shed, because the cases say you can be in the air and if you can see them from the air, then there is nor unreasonable intrusion on the person's right to privacy.

THE COURT: Okay.

MR. SALTON: Judge, briefly. Your Honor, the Diehl case that's cited in the memorandum, here it's also a situation where the marijuana plot was significantly far away from the house and in that case an

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aerial search found a patch of marijuana on a five acre track of property, which belonged to appellant, investigators, officers on the ground was directed to a public road adjacent to appellant's property from where they could also observe the

marijuana patch. They seized the marijuana plants.

While they were there, they saw some more on a path and when they went and seized that, that path took them to a mobile home. So, we're talking about something that is also far away. Though, the State is correct, not one of those cases has suppressed the search. They don't say anything viewing from the air is seizable. Each one specifically discusses why it's allowed. And in the Oliver instance, they say in that particular situation, because of the nature of what's growing, that there was no reasonable expectation of privacy; either it was far away from the house, 300, to 450 feet, so it's not, one, the curtilage, or the one case where they decided that it wasn't fenced and was used for commercial, it doesn't just because it's from the air.

And you can see it's legal. It specifically says, "Since it did not lie within a common fence or enclosure, was manifestly used for commercial rather than for family or domestic purposed associated within

[*48]

the dwelling, it can not be deemed to be within the curtilage." They're saying, because of the nature that it's there, it doesn't fit within that expectation of privacy. My question is: Did my client manifest an expectation of privacy? Did he manifest it from the ground and did he manifest it from the air?

There is no case that has ruled a search legal where he has shown that type of expectation of privacy. Either it be totally open from the air, or it be completely far away from the house, so it's not within the area of the dwelling. And these

pictures, I submit, clearly show that he had that expectation from both the air and the ground. And if you look at G, you can see that, even though there is a side open, and according to the police officer, what was open was in that area between that area and the trailer, as he indicated.

So, that's obviously not viewable to anybody and this area over here, not the area where those structures were, if you look at photograph G, you can see that it surely is not visible from the area of the ground and, though, there it is not fenced, there is significant shrubbery in the area and so forth, around that that's going to shield it.

THE COURT: Apparently, there is a fence, accord-

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ing to these photographs?

MR. SALTON: I meant a side. And I think he showed a manifestation of privacy that none of these cases have shown. And the only thing I'd point out the memorandum talks about is United States versus Leon. Well, what we have here is a question of not a search, we have an unconstitutional search prior to getting the search warrant. This wasn't a situation like Leon, where they got a search warrant and there was an issue later so to what facts they really had that justified the search warrant. We had a constitutionally invalid intrusion prior to the search warrant. So, I would submit, that Leon doesn't apply.

MISS CONDON: Judge, if I may respond to that. I think one of the reasons it does apply is because in his Motion to Suppress, Mr. Salton has alleged that there was not sufficient probable cause to justify the issuance of the warrant, and of course,

that's what Leon deals with, and that's why I would cite that to the Court.

So, I think it's applicable in this situation, that a good faith doctrine would indicate that the officers did rely on good faith on the issuance of this warrant, and therefore, any evidence seized should

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be admissible.

MR. SALTON: My motion has two, one, as I've indicated, I really don't think Kurt Gell could identify those plants from that altitude. And the other is the constitutional intrusion.

THE COURT: Well, I know people, who from 400 feet with a rifle with open sides can hit very small targets, so I'm going to have to accept his word that he can see what he says he can see.

As far as the question as to constitutional law, I'm going to read the

cases before I rule on that. If you want to leave me the copies that you have, the one that are in the Florida Law Weekly, I'd appreciate it.

MR. SALTON: I've got a lot of my own scribbling notes.

THE COURT: That's okay. I'll ignore your scribbling and I'll read them and you'll know one day this next coming week.

MR. SALTON: Okay, Judge, I'll leave them all for you.

(HEARING CONCLUDED).

[*51]

STATE OF FLORIDA)
)
COUNTY OF PASCO)

I, MARY A. FORTNER, Deputy Official Court Reporter and Notary Public, State of Florida at Large,

DO HEREBY CERTIFY that proceedings were had in the captioned matter at the time and place set forth herein; that I was authorized to and did report stenographically said proceedings and testimony and that the foregoing pages, numbered 1 through 50 inclusive, constitute a true and correct transcription of the shorthand report of said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this ___ day of January, 1985, at New Port Richey, Pasco County, Florida.

MARY A. FORTNER
Deputy Official Court Reporter
Sixth Judicial Court

IN THE CIRCUIT COURT OF THE SIXTH
JUDICIAL CIRCUIT IN AND FOR
PASCO COUNTY, FLORIDA

STATE OF FLORIDA) Case No. 84-1606CFAWS
)
vs.)
)
MICHAEL RILEY)
_____)

O R D E R

THIS MATTER coming on to be heard on the 14th day of December, 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs. The portion of

the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing

panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the

greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 15, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds:

That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the

curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure, having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view of its contents. Likewise the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla. 2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1DCA, Fla. 1982), all of which

involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Copies forwarded to:

Marc Salton, Esq.
Office of the State Attorney

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)

Appellant,)

v.) CASE NO. 84-2818

MICHAEL A. RILEY,)

Appellee.)

Opinion filed October 16, 1985.

Appeal from the Circuit
Court for Pasco County;
W. Lowell Bray, Jr., Judge.

Jim Smith, Attorney General,
Tallahassee, and Candance M.
Sunderland, Assistant Attorney
General, Tampa, for Appellant.

Marc H. Salton, New Port
Richey, for Appellee.

GRIMES, Acting Chief Judge.

This appeal passes on the validity of a seizure of marijuana under a search warrant obtained as a result of aerial surveillance.

On appellant's motion to suppress, the trial court entered a comprehensive order which reads as follows:

O R D E R

THIS MATTER coming on to be heard on the 14th day of December 1984, upon the Defendant's Motion to Suppress, and the Court being duly advised in the premises, the Court finds that the testimony and photographic evidence introduced in this case establish the following:

The Defendant, MICHAEL RILEY, rented and occupied a parcel of property containing in excess of five (5) acres. A portion of this property contained a mobile home, occupied by the Defendant as a dwelling, and certain out-buildings. The property is located in a rural area and contained numerous trees and shrubs.

The portion of the property containing the mobile home and out-buildings was enclosed or partially enclosed by a net wire fence. One of the photographs of the property depicts a "DO NOT ENTER" sign posted in an area in front of the mobile home.

The major out-building is located about 10' to 20' to the rear of the mobile home. This building is enclosed on two sides. One of the remaining sides is open to an area of trees and shrubbery (within the fenced area) which obscure it from view, and the fourth side is screened by the mobile home and by one or more trees located between the greenhouse and the mobile home. The roof of the greenhouse is constructed of corrugated roofing, a portion of which is translucent and a portion of which is opaque. There are two openings in the roof which appear to be caused by either removing or not installing two of the corrugated roofing panels. The combined open space amounts to approximately one-tenth of the total roof area. The testimony before the Court indicates that the contents of this greenhouse were not visible from any adjacent property.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon information which had been received by another deputy, investigated the property for possible violation of statutes prohibiting cultivation of cannabis. The deputy and a pilot employed by the Pasco County Sheriff's Office approached the property by helicopter at an altitude of approximately 400 feet. As the helicopter approached the property, Deputy Gell, using

a camera with a telephoto lens, took photographs of the mobile home and greenhouse. The evidence is unclear as to whether the helicopter descended below 400 feet, but it did circle over the greenhouse twice while the deputy observed the property. Deputy Gell testified that through the openings in the roof and through one or more of the open sides of the greenhouse, he could see and identify growing marijuana plants. At this point the deputy left the subject property and prepared an affidavit which was the basis for the issuance of a search warrant.

On August 16, 1984, pursuant to the execution of the search warrant, the evidence sought to be suppressed by the Defendant was seized. Said evidence included 44 marijuana plants found growing in the greenhouse.

Based on these facts, the Court holds: That the Defendant exhibited an actual and reasonable expectation of privacy in an area which is protected by the Fourth Amendment and the Declaration of Rights. Clearly, the greenhouse is within the curtilage and is therefore a constitutionally protected area. In addition, the roof or covering over the area in which the plants were located is a clear indicium of a desire for privacy from observation from the air. The structure,

having two open sides, affords its contents scant protection from inclement weather and serves no purpose other than to obstruct the view of its contents. Likewise, the purpose of the opening in the roof was not to allow a viewing of the contents but was to admit sunlight (compare the plastic sheets in Huffer v. State, 344 So.2d 1332 [Fla. 2d DCA 1977]) and possibly permit circulation of air.

The Court notes that this case is distinguishable from the cases of Diehl v. State, 9 FLW 2505, 1 DCA, Fla., 12/3/84, Brennan v. State, 417 So.2d 1024, (Fla. 2nd DCA 1982) and Murphy v. State, 413 So.2d 1268, (1 DCA, Fla. 1982), all of which involved aerial viewings of open fields. The Court further notes that this case is distinguishable from Randall v. State, 9 FLW 2354, November 16, 1984, in that the Defendant herein has manifested a reasonable expectation of privacy from aerial surveillance.

The Court does not reach the question of whether circling over the subject property at an altitude of 400 feet or less is in itself an invasion of a constitutionally protected area. It is therefore

ORDERED AND ADJUDGED that the Defendant's Motion to Suppress is granted, and the evidence seized

pursuant to the execution of the search warrant is hereby suppressed.

DONE AND ORDERED in Chambers, at New Port Richey, Florida, this 19th day of December, 1984.

/s/ W. Lowell Bray, Jr.
W. Lowell Bray, Jr.
Circuit Judge

Though not noted in his order, the trial judge, at the hearing, specifically accepted as true the deputy's statement that he could see the marijuana plants from his position of aerial surveillance.

On appeal, the state argues that this case must be reversed on the authority of Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984). We agree.

In order to fully appreciate the Randall decision, it is first necessary to discuss the case of State v. Rickard, 420 So.2d 303 (Fla. 1982). In Rickard, the police had seized marijuana from the defendant's back yard after having observed the

contraband from an orange grove behind the defendant's property. Because the defendant had taken steps to block the view of his back yard from his only adjacent neighbor, the [S]upreme [C]ourt held that the defendant had exhibited a reasonable expectation of privacy in that area and quashed the warrantless seizure. However, the [S]upreme [C]ourt specifically held that the officer's initial observation of the marijuana from the orange grove qualified as a legally permissible preintrusion open view rather than a search. The seizure of the marijuana was not quashed because of the officer's conduct in viewing the defendant's back yard from the nearby grove but because of his failure either to obtain a search warrant authorizing the seizure or to demonstrate an exception to the warrant requirement.

In Randall, the police received a tip that the defendant was growing marijuana

behind his house, but the plants could not be observed from the ground because the back yard was surrounded by a reed fence. However, the police were able to identify the marijuana from the vantage point of a helicopter flying at a routine patrol altitude. After analyzing Rickard, the court concluded that the appellant had exhibited a reasonable expectation of privacy from view not only from the ground but also from the air despite the lack of any shielding from aerial observation. Notwithstanding, the court concluded that the aerial surveillance made by the police from a place where they had a legal right to be did not constitute a governmental intrusion which rose to the level of an impermissible search. Thus, the police were entitled to use the information obtained from the aerial view as the basis for

probable cause to obtain a search warrant.

The court concluded:

> While the efforts undertaken by police officers in order to gain a view into a constitutionally protected area undoubtedly must be considered in determining the degree of governmental intrusion, we do not deem aerial observation alone to be unreasonably intrusive under the circumstances presented. Society appears willing to accept aerial surveillance as a reasonable and necessary investigative tool in effective modern law enforcement. Furthermore, we do not believe that requiring police to procure a warrant before executing an general aerial overflight such as that conducted in the instant case would significantly advance the protection of legitimate privacy interests. See Oliver v. United States, __ U.S. __, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (addressing, peripherally, aerial surveillance of an open field). In short, we conclude that the non-harassing surveillance conducted in the instant case struck an acceptable balance between society's interest in effective modern law enforcement and the individual's interest in the values protected by the fourth amendment.

458 So.2d at 825-826.

The instant case differs from Randall only in the fact that the appellant had erected a roof over most of his greenhouse. Consequently, this provided a basis for the judge to conclude that appellant had demonstrated a reasonable expectation of privacy from aerial surveillance. However, the Randall case was decided on the same principle because the court acknowledged that by having fenced his property from ground observation, it was unnecessary for the defendant to construct an "opaque bubble" over his back yard in order to manifest a reasonable expectation of privacy, even from aerial surveillance. Therefore, appellant's effort to cover his greenhouse from aerial observation becomes an irrelevant distinction from Randall.

Recognizing that its interpretation was one of first impression in Florida, the Randall court certified a question to

the [S]upreme [C]ourt. Since the parties did not further pursue the case, there is no [S]upreme [C]ourt authority on the subject. Hence, we certify the following question to the [S]upreme [C]ourt as one of great public importance:

> WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PREINTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

REVERSED.

FRANK and HALL, JJ., Concur.

SUPREME COURT OF FLORIDA

No. 67,906

MICHAEL A. RILEY, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[July 9, 1987]

BARKETT, J.

We have for review State v. Riley, 476 So.2d 1354 (Fla. 2d DCA 1985), in which the district court upheld the validity of a seizure of marijuana under a search warrant obtained as the result of aerial surveillance and certified the following as a question of great public importance:

> WHETHER POLICE OFFICERS, RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PRE-INTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELLING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN

> A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Id. at 1356-57.

Because the certified question as stated contains language inconsistent with established search-and-seizure analysis, we restate the question as follows:

> WHETHER SURVEILLANCE OF THE INTERIOR OF A PARTIALLY COVERED GREENHOUSE IN A RESIDENTIAL BACKYARD FROM THE VANTAGE POINT OF A HELICOPTER LOCATED 400 FEET ABOVE THE GREENHOUSE CONSTITUTES A "SEARCH" FOR WHICH A WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION?

The issue here is one of first impression in this state and one which obviously involves serious questions of public policy. We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, answer the restated question in the affirmative, and quash the decision of the district court below.

Petitioner Michael A. Riley rented approximately five acres of rural property on which was located a mobile home which petitioner used as a residence. The greenhouse in question was located ten to twenty feet behind the mobile home. Both buildings were enclosed by a net wire fence. A "DO NOT ENTER" sign was posted in front of the mobile home. The greenhouse was enclosed on two sides; the remaining sides were obscured by trees and shrubbery within the fenced area and the mobile home. Two panels were missing from the roof of the greenhouse, exposing approximately one-tenth of the roof area.

Deputy Kurt Gell of the Pasco County Sheriff's Office, acting upon an anonymous tip that marijuana was being grown on petitioner's property, went to investigate. Unable to discern the contents of the greenhouse from the road, Deputy Gell

obtained a helicopter and flew over petitioner's property at about 400 feet.[1] Through the openings in the roof and through one or more of the open sides of the greenhouse, he saw what he believed to be marijuana. Based upon his observations from the helicopter, Deputy Gell then obtained a warrant to search the greenhouse.[2]

The search warrant was executed and forty-four marijuana plants were found growing in the greenhouse. Petitioner was charged with unlawful possession and manufacture of marijuana under

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1/ The evidence was unclear as to whether the helicopter descended below 400 feet. The helicopter did circle over the greenhouse twice. Riley, 476 So.2d at 1355.

2/ Although Deputy Gell also took photographs of the greenhouse from the air, the trial judge apparently accepted his statement that he identified the marijuana from the air and not from the photographs. Riley, 476 So.2d at 1355.

section 893.13, Florida Statutes (1983). The trial court granted petitioner's motion to suppress the evidence on the ground that petitioner manifested a reasonable expectation of privacy from aerial surveillance. On appeal, the Second District reversed on the authority of its own decision in Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984),[3] and certified the issue to the Court.

Petitioner, relying on Katz v. United States, 389 U.S. 347 (1967), contends that the aerial surveillance of his greenhouse was a search in violation of his rights under the fourth amendment to the United States Constitution and article I, section 12 of the Florida Constitution. The state counters that the surveillance was a legally

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[3] In that case, the district court certified a similar question to the Court, but the parties did not pursue the issue. Randall, 458 So.2d at 826.

permissable "preintrusion view" in accordance with this Court's decision in State v. Rickard, 420 So.2d 303 (Fla. 1982), and the Second District's decision in Randall v. State. We agree with petitioner that under the facts of this case the helicopter surveillance by the state constituted a search and an impermissible violation of privacy rights.

We begin our analysis with two recent United States Supreme Court decisions involving aerial surveillance, California v. Ciraolo, 106 S.Ct. 1809 (1986), and Dow Chemical Co. v. United States, 106 S.Ct. 1819 (1986).[4]

In Ciraolo, police flew over the defendant's property in a fixed-wing plane at a height of 1,000 feet to confirm an anonymous tip that the defendant was growing

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[4] These cases were decided after the decision of the Second District below.

marijuana in his backyard. The property was surrounded by a ten foot high fence, preventing ground level observation. In Dow Chemical, a government regulatory agency took aerial photographs of Dow's industrial complex from altitudes of 12,000, 3,000, and 1,200 feet. Extensive security prevented any public viewing of the facility.

The Court reaffirmed the standard established in Katz and then applied the Katz test to the aerial surveillance which had occurred in each case. Under the Katz standard, the legality of a warrantless police intrusion into allegedly private activities depends upon whether a person has a "reasonable" expectation of privacy in the invaded area. Id., 389 U.S. at 360 (Harlan, J., concurring). In Katz, the Supreme Court abandoned the traditional analysis which defined a search by reference to whether the police had committed a

physical trespass, see Olmstead v. United States, 277 U.S. 438 (1928), and shifted the focus to whether the government had violated the privacy upon which the individual had justifiably relied. Katz, 389 U.S. at 353. Recognizing that the "constitutionally protected areas" approach provided no real protection against surveillance techniques made possible through advancing technology, the Court made clear that "the Fourth Amendment protects people, not places."[5/] Id. at 351-52. Thus, "[w]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id.

Katz and its progeny established a two-pronged test for determining whether

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5/ This does not mean that the location of the observed activities or objects has no bearing on search-and-seizure analysis. The question whether a legitimate expectation of privacy has been invaded generally requires reference to a place. Katz, 389 U.S. at 361.

the government has intruded upon an individual's reasonable expectation of privacy. First, an individual by his conduct must exhibit an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)); Norman v. State, 379 So.2d 643, 647 (Fla. 1980).

The Ciraolo court, having determined that the yard in question was within the curtilege of the defendant's home, found that "[c]learly--and understandably--" the defendant had met the test of manifesting his own subjective intent and desire to maintain privacy. 106 S.Ct. at 1811. The Court noted that the protection afforded the curtilege [sic] is essentially a protection of families and personal privacy in an area intimately linked to the home

both physically and psychologically "where privacy expectations are most heightened." Id. at 1812.

The inquiry in Ciraolo thereafter centered on the second prong of Katz, specifically, "whether naked-eye observation of the curtilege [sic] by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." Id. at 1812. The Court decided that the expectation was not reasonable where:

> The observations . . . took place within public navigable airspace . . . in a physically nonintrusive manner; from this point they [the police] were able to observe plants readily discernable to the naked eye as marijuana. . . . Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

106 S.Ct. at 1813 (emphasis supplied, citation omitted).

In Dow Chemical, decided the same date as Ciraolo, the Court upheld the warrantless taking of aerial photographs, again limiting its holding to observations made from public navigable airspace:

> We conclude that the open areas of an industrial plant complex . . . are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; . . . such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.

Id. at 1827 (footnote omitted). The Court also rested its conclusion on the fact that the area at issue was not an area immediately adjacent to a private home, where privacy expectations are most heightened, nor an area where Dow had made any effort to

protect against aerial surveillance. Id. at 1826 n.4.

In light of Ciraolo and Dow Chemical, we believe the state's reliance on Rickard is misplaced. Rickard did not deal with aerial surveillance such as we have here nor with any other modern surveillance technologies against which a citizen can do little to protect. In Rickard, police were lawfully in a neighbor's orange grove when they observed marijuana growing in Rickard's backyard. The plants were open to naked-eye view by any casual observer. Clearly, Rickard had made no attempt to prevent observations from the orange grove and, therefore, had not exhibited a reasonable expectation of privacy in his backyard from naked-eye observations from neighboring property. Accordingly, we held that the police observations in that case were not a search but were a legally

permissible "preintrusion view" which occurs when a police officer who is located where any citizen has a right to be can look into the protected area and, in a reasonable manner, observes contraband. Rickard, 420 So.2d at 305; Ensor v. State, 403 So.2d 349, 352 (Fla. 1981).[6] Such observations are generally permissible because an individual has no expectation of privacy in objects or activities knowingly exposed to the public. See Katz, 389 U.S. at 351.

Under Katz, however, the determination of whether a police officer is in a place

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6/ Because the police are not already legally within the protected area when the observation is made, they must obtain a warrant before entering the protected area to seize the contraband. A "preintrusion view" is thus different from the "plain view" exception to the fourth amendment's warrant requirement established in Coolidge v. New Hampshire, 403 U.S. 443 (1971). See Ensor. Under the "plain view doctrine," when police legally within a constitutionally protected area observe, without the benefit of a search, evidence which they have probable cause to believe is contraband, they may seize it without a warrant.

where he or she has a right to be is not always conclusive of whether the particular conduct constitutes a search. The essential teaching of Katz is that private activities do not lose their fourth amendment protection merely because technology exists which enables the police to view the activities from an otherwise nonintrusive vantage point. See, e.g. Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (protracted surveillance of contents of greenhouse with telescopes and lenses of increasing magnitude constitutes a search). Wherever an individual harbors a "reasonable expectation of privacy," he or she is entitled to be free from unreasonable government intrusion.[7]

7/ Accordingly, we have restated the certified question to avoid the implication that an alleged search might be valid despite the finding that both prongs of the Katz test have been satisfied, to wit, that the appropriately manifested expectation of privacy in the area searched was

(continued...)

We turn now to the case at hand. As in Ciraolo, there is no question in this case that the first prong of the Katz test has been met. Petitioner clearly exhibited a subjective expectation of privacy in the greenhouse and its contents and thus we concur with the trial court and the district court in this regard. The opacity of the greenhouse, the fence surrounding it, and the "KEEP OUT" sign all show petitioner's subjective expectation that the interior of the greenhouse would remain shielded from earthbound and aerial observation. The fact that a few panels in the roof were missing does not alter our conclusion. Similar efforts have been held to establish a subjective expectation of privacy, and thus to satisfy the first prong of Katz. See e.g., People v. Sabo, 185 Cal.App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986)

7/(...continued)
reasonable.

(reasonable expectation of privacy in greenhouse partially screened by evergreens and from which some roof and side panels were missing), cert. denied, 107 S.Ct. 2200 (1987); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977) (reasonable expectation of privacy in hothouse located on residential premises even though plastic covering may have allowed someone to look in from the outside); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980) (defendant's covering of greenhouse with materials so as to shield contents demonstrated subjective expectation of privacy); Wheeler v. State, 659 S.W.2d 381 (Tex.Crim.App. 1982) (subjective expectation of privacy in greenhouse despite four foot square louvered opening for purpose of ventilation).

Moreover, as in Ciraolo, we find that the area in question constituted the curtilege [sic]. State and federal courts

have long recognized that the curtilage concept extends to residential backyards and outbuildings located within close vicinity of the residence. Taylor v. United States, 286 U.S. 1, 6 (1932); United States v. Williams, 581 F.2d 451, 454 (5th Cir.1978), cert. denied, 440 U.S. 972 (1979); Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955); State v. Rickard, 420 So.2d 303, 306 (Fla. 1982); Norman v. State, 379 So.2d 643 (Fla. 1980); Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977); Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974); State v. Fierge, 673 S.W.2d 855, 856 (Mo.App. 1984); Brown v. Oklahoma City, 721 P.2d 1346, 1349 (Okla. App. 1986).

Traditionally, the fourth amendment provides a high degree of protection to the curtilage of a residence, those areas "immediately adjacent to the home" to which extend "the intimate activity associated

with the 'sanctity of a [person's] home and the privacies of life' [citation omitted] . . ." Oliver v. United States, 466 U.S. 170, 180 (1984). Indeed, the curtilage "has been considered part of [the] home itself for Fourth Amendment purposes. . ." Id. at 170. The reason for this was expressed well by the Sixth Circuit in Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984):

> The doctrine of curtilage is grounded in the peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home. The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways. The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is . . . true because people have both actual and reasonable expectations that many of the private

> experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place.

We are left with the question of whether the observation from the air in this case violates an expectation of privacy that is reasonable.

After Ciraolo, there is little question that naked-eye observations of marijuana growing in an enclosed backyard from fixed-wing aircraft within navigable airspace do not violate the federal constitution. However, we do not read Ciraolo as sanctioning an unlimited right to any type of examination of residential property from the air. Indeed, we note the care taken to qualify and limit the permissible observation to the "naked eye" from "navigable air space" at an "altitude of

1000 feet" in a "physically nonintrusive manner."8/

These are not the facts presently before us. We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet so that its occupants can look through an opening in a roof.

As we already have noted, Katz warned of the dangers created by technological advances by which the police can conduct surveillance. Whether or not aerial surveillance is an example of such a

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8/ In a footnote to its conclusion, the Court noted that the state conceded that "'[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" Ciraolo, 106 S.Ct. at 1813-14 n.3.

technological advance,[9] we believe it is more susceptible to abuse and invasion of privacy than ground surveillance. As the California Supreme Court recognized in People v. Cook, 41 Cal.3d 373, 382, 221 Cal.Rptr. 499, 505, 710 P.2d 299, 305 (1985), the concept of protected areas has little meaning when it comes to aerial surveillance:

> Purposeful surveillance from the air simply lays open everything and everyone below--whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs--to minute inspection. The usual steps one might take to protect his privacy are useless.

Surveillance by helicopter is particularly likely to unreasonably intrude upon private activities. The first court to find aerial surveillance unconstitutional

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9/ At least one court has so held. United States v. Broadhurst, 805 F.2d 849, 853 n.3 (1986). But see State v. Myrick, 102 Wash.2d 506, 688 P.2d 151 (1984) (rejecting the contention that aircrafts generally are overly intrusive technological devices when used for surveillance purposes).

did so because the police hovered in their helicopter twenty to twenty-five feet above the ground and 125 feet away from appellant's residence in an effort to identify marijuana in a corral. People v. Sneed, 32 Cal. App.3d 535, 108 Cal.Rptr. 146 (1973). Other courts have recognized that because of a helicopter's virtually unlimited maneuverability and observational capabilities, helicopter surveillance poses a serious risk to privacy. See National Organization For Reform of Marijuana Laws (NORML) v. Mullen, 608 F.Supp. 945 (N.D.Cal. 1985) (highly disruptive character of low helicopter flights distinguishes them from common airplane overflights to which society is accustomed), remanded, 796 F.2d 276 (9th Cir. 1986). In People v. Sabo, 185 Cal. App.3d 845, 230 Cal.Rptr. 170 (Cal.App. 1986), the court invalidated a warrantless aerial search under circumstances nearly

identical to those here. Noting that helicopters may lawfully be operated in nonnavigable airspace,[10/] the court concluded that such lawful operation did not fall within the aerial surveillance approved in Ciraolo and Dow Chemical. In reaching this conclusion, the court judicially noticed the unique capabilities of the helicopter as compared to fixed- wing aircraft:

> To say any sighting from a helicopter in nonnavigable airspace validates a search warrant sanctions a broad range of aerial acrobatics performed in lawful manner but admittedly intrusive,

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10/ The Sabo court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes, and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. § 91.79(d) (1986). 230 Cal.Rptr. at 174-75.

> such as interminable hovering, a persistent overfly, a treetop observation, all accompanied by the thrashing of the rotor, the clouds of dust, and earsplitting din. Views from navigable airspace are far removed from the situs observed . . . [whereas] [t]he lawfully operated helicopter need stand back only such distance as not to hazard persons or property.

Id. at 175-76.

We do not believe that the details observed here from the vantage point of a circling and hovering helicopter could just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. Cf. Ciraolo, 106 S.Ct. at 1813. The possibility of observation of the interior of a greenhouse by passengers on commercial and private aircraft in the public airways is extraordinarily remote. Even more remote is the possibility that an observer would connect what he or she observed to a specific person. Although petitioner may not have had a legitimate

C. Law Enforcement Agencies And Courts Have A Need For A Bright Line Rule Permitting Warrantless Naked-Eye Aerial Observation.

Both law enforcement agencies and the courts need a bright line rule for permissible warrantless aerial observation.

The need for such rules with respect to the Fourth Amendment "search" clause for police on the beat -- and in the air -- has long been recognized. "[I]f police are to have workable rules, the balancing of interests . . . must in large part be done on a categorical basis -- not in an ad hoc, case-by-case fashion by individual police officers."11/

11/ Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Accord, e.g., New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768, 773 (1981) (quoting LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct. Rev. 127, 141-42).

"Fourth Amendment protections can only be realized if the police are acting under a set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."12/ This is because:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts, and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible

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12/ Belton, supra, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773, quoting LaFave, supra, at 142.

of application by the officer in the field.

Belton, supra, 453 U.S. at 458, 101 S.Ct. at 2863, 69 L.Ed.2d at 773-74, quoting LaFave, supra, at 141.

The need for a bright line rule as to warrantless aerial observation is equally clear for courts. For now, less than two years after this Court decided Ciraolo, the Florida Supreme Court, purporting to follow Ciraolo, has held a warrantless naked-eye observation from a helicopter in space where it lawfully could be to violate the Fourth Amendment. And the California courts, in seeking to follow Ciraolo in the context of helicopters, have only contradicted each other.13/

13/ See note 4, supra, and particularly Sabo, supra, which the decision below followed, and Romo, supra, which disagreed with just about everything the Sabo court said (and which the California Supreme Court also declined to review).

The courts have been deluged with cases involving aerial observations. The reported cases involve helicopters14/ as

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14/ Reported helicopter cases include: United States v. Marbury, 732 F.2d 390 (5th Cir. 1984); United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), cert. denied, 454 U.S. 833, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981); NORML v. Mullen, 608 F.Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986), amended, 828 F.2d 536 (9th Cir. 1987); People v. Messervy, 175 Cal. App. 3d 243, 221 Cal. Rptr. 10 (Cal. 2d Dist. Ct. App. 1985); People v. Roberts, 195 Cal. App. 3d 479, 240 Cal. Rptr. 658 (Cal. 1st Dist. Ct. App. 1987); People v. Superior Court for County of Los Angeles (Stroud), 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (Cal. 2d Dist. Ct. App. 1974); People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (Cal. 5th Dist. Ct. App. 1973); Izzard v. State, 10 Ark. App. 265, 663 S.W.2d 192 (Ark. Ct. App. 1984); Randall v. State, 458 So.2d 822 (Fla. 2d DCA 1984); Masters v. State, 453 So.2d 183 (Fla. 3d DCA 1984); Brennan v. State, 417 So.2d 1024 (Fla. 2d DCA 1982); Murphy v. State, 413 So.2d 1268 (Fla. 1st DCA 1982); State v. Knight, 63 Haw. 90, 621 P.2d 370 (1980); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977); Commonwealth v. Beals, 313 Pa. Super. 346, 459 A.2d 1263 (Pa. Super. Ct. 1983); State v. Roode, 63 S.W.2d 651 (Tenn. 1982); State v. Layne, 623 S.W.2d 629 (Tenn. 1981); Goehring v. State, 627 S.W.2d 159 (Tex. Crim. App. 1982); State v. Fierge, 673 S.W.2d 855 (Mo. Ct. App.

(continued...)

often as they do fixed-wing aircraft.[15]

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[14] (...continued)
1984); State v. Rogers, 100 N.M. 517, 673 P.2d 142 (N.M. Ct. App. 1983); People v. Abbott, 105 A.D.2d 1029, 483 N.Y.S.2d 452 (N.Y. App. Div. 1984).

[15] Reported fixed-wing aircraft cases include: United States v. Bassford, 601 F.Supp. 1324 (1985), aff'd, 812 F.2d 16 (1st Cir. 1987); United States v. Mullinex, 508 F.Supp. 512 (E.D. Ky. 1980); United States v. DeBacker, 493 F.Supp. 1078 (W.D. Mich. 1980); United States v. Broadhurst, 805 F.2d 849 (9th Cir. 1986); People v. Cook, 41 Cal. 3d 373, 221 Cal. Rptr. 499, 710 P.2d 299 (Cal. 1985); People v. Stanislawski, 180 Cal. App. 3d 748, 225 Cal. Rptr. 770 (Cal. 1st Dist. Ct. App. 1986); People v. Smith, 180 Cal. App. 3d 72, 225 Cal. Rptr. 348 (Cal. 1st Dist. Ct. App. 1986); People v. Joubert, 118 Cal. App. 3d 637, 173 Cal. Rptr. 428 (Cal. 5th Dist. Ct. App. 1981); People v. St. Amour, 104 Cal. App. 3d 886, 163 Cal. Rptr. 187 (Cal. 1st Dist. Ct. App. 1980); Dean v. Superior Court for the County of Nevada, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (Cal. 3d Dist. Ct. App. 1973); Diehl v. State, 461 So.2d 157 (Fla. 1st DCA 1984); Castello v. State, 442 So.2d 990 (Fla. 1st DCA 1983); Williams v. State, 157 Ga. App. 476, 277 S.E.2d 923 (Ga. Ct. App.), cert. denied, 454 U.S. 823, 102 S.Ct. 108, 70 L.Ed.2d 95 (1981); People v. Lashmett, 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (Ill. App. Ct. 1979), cert. denied, 444 U.S. 1081, 100 S.Ct. 1034, 62 L.Ed.2d 765 (1980); Blalock v. State, 483
(continued...)

Certainly there have been many more cases not reported. A bright line rule will enable more expeditious judicial administration.

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[15] (...continued)
N.E.2d 439 (Ind. 1985); State v. Ryder, 315 N.W.2d 786 (Iowa 1982); State v. Davis, 51 Or. App. 827, 627 P.2d 492 (Or. Ct. App. 1981), petition denied, 291 Or. 368, 634 P.2d 1346 (1981); State v. Bigler, 100 N.M. 515, 673 P.2d 140 (N.M. Ct. App. 1983); State v. Farkes, 71 Or. App. 155, 691 P.2d 489 (Or. Ct. App. 1984); State v. Bruno, 68 Or. App. 827, 683 P.2d 1383 (Or. Ct. App. 1984); State v. Cord, 103 Wash. 2d 361, 693 P.2d 81 (Wash. 1985); State v. Cockrell, 102 Wash. 2d 561, 689 P.2d 32 (Wash. 1984); State v. Myrick, 102 Wash. 2d 506, 688 P.2d 151 (Wash. 1984) (en banc).

The aircraft in question is apparently not specified in the following cases: People v. Egan, 141 Cal. App. 3d 798, 190 Cal. Rptr. 546 (Cal. 3d Dist. Ct. App. 1983); Tuttle v. Superior Court, 120 Cal. App. 3d 320, 174 Cal. Rptr. 576 (Cal. 5th Dist. Ct. App. 1981); Burkholder v. Superior Court for County of St. Crews, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (Cal. 1st Dist. Ct. App. 1979); Reece v. State, 152 Ga. App. 760, 264 S.E.2d 258 (Ga. Ct. App. 1979); State v. Havlat, 222 Neb. 554, 385 N.W.2d 436 (1986); State v. Daleganski, 84 Or. App. 372, 734 P.2d 357 (Or. Ct. App. 1987); Wellford v. Commonwealth, 227 Va. 297, 315 S.E.2d 235 (1984); State v. Grawien, 123 Wis. 2d 428, 367 N.W.2d 816 (Wis. Ct. App. 1985).

The need for a bright line rule was implicitly recognized by the Florida Supreme Court. Its conclusion that Deputy Gell's warrantless naked-eye aerial observation violated the Fourth Amendment was based on its own bright lines of "navigable airspace," "targeted" observations, and "curtilage." That none of these lines, or its conclusion, is correct does not diminish the need for a bright line rule.

D. The Bright Line Rule As to Warrantless Naked-Eye Aerial Observation Should Permit The Police Observer To See Whatever May Be Seen So Long As The Observer Is Where He Has A Right To Be.

Florida submits the simple direct bright line test for constitutionally permissible naked-eye warrantless aerial observation is that the police observer be where he or she is lawfully permitted to

be. This rule should apply no matter what the aerial platform or vantage point.16/ Florida submits no greater or lesser test

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16/ The rule for constitutionally permissible amplification of naked-eye observation is not presented and cannot be determined in this case. The attack of the court below on the observation here was not that it was secret and not that it was amplified, but rather the observation was made at too low an altitude. This case is not "The Spy In the Sky," a domestic version of Gary Powers' U-2 or the satellite with startling powers of magnification. Although the teaching of Dow, supra, is that some degree of amplification is permissible (use of "floor mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet" (476 U.S. at 230, 106 S.Ct. at 1822, 90 L.Ed.2d at 232), which could "discern equipment, pipes, and power lines as small as 1/2 inch in diameter." Dow Chemical Co. v. United States, 536 F.Supp. 1355, 1357 (E.D. Mich. 1982), rev'd, 749 F.2d 307 (6th Cir. 1984), aff'd, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)), the extent of permissible amplification is not there delimited. Presumably the issue posed by amplification is whether there is a reasonable expectation that one cannot, through amplification, "enter" a space the observer would not otherwise legally have a right to be. That certainly would follow from Katz.

of the validity of the observation is constitutionally necessary.

1. There Is No Principled Distinction Between Observation From Fixed-Wing Aircraft And Helicopters So Long As The Police Observer In Each Case Is Where He Has A Right To Be.

So long as the police observer is where he or she has a right to be, there is no principled distinction between observation from a fixed-wing aircraft and a helicopter. For the purpose of observing marijuana cultivating operations, either is simply a platform from which to look. One is constitutionally no better and no worse than the other. As the plethora of cases listed in notes 14 and 15, supra, shows, both have utility in law enforcement.

The Florida Supreme Court, taking its cue from Sabo, was inclined to the belief that all aerial observations are, inherently,

"more susceptible to abuse and invasion of privacy" than ground observations. J.A. 130. But that court expressed further reservations about helicopters, specifically they are "particularly likely to unreasonably intrude upon private activities," and their "virtually unlimited maneuverability and observational capabilities" invade privacy, and, in addition, expressed its belief that one cannot "as easily" observe from a fixed-wing aircraft as from a helicopter. J.A. 130, 131, 133. Since none of these "inherencies" was predicated on any stated factual basis, Florida submits they have no credibility in Fourth Amendment interpretation. To find one type of platform objectionable while another is acceptable must be based on some factual predicate. Otherwise the distinction is not principled.

Fourth Amendment interpretation has required the objective reasonableness of

the defendant's expectations of privacy be interpreted in light of current technology. See Katz, supra. That the Framers could not have contemplated the advent of electronic eavesdropping does not make such activity immune from Fourth Amendment review. But technology which is generally known must itself condition the reasonableness of any expectation of privacy. The very fact that law enforcement agencies generally use both fixed-wing aircraft and helicopters is widely known. That the public generally has access to and broadly utilizes this technology for a host of purposes other than law enforcement must further condition (if not eliminate) privacy expectations relating to things seen by unaided vision from aircraft.17/

17/ It is axiomatic that "[t]he 'reasonableness' of any governmental intrusion is to be judged from two perspectives -- that of the defendant, (continued...)

That law enforcement agencies use both fixed-wing aircraft and helicopters does not mean their capabilities are identical. Helicopters have truly unique capabilities. See, e.g., R. H. McGowan, Police Helicopters, 33 Air Beat 10 (Nov./Dec. 1987) (part 1 of 3) (Journal of the Airborne Law Enforcement Association).18/ It is just these unique

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17/ (...continued)
considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action." Payton v. New York, 445 U.S. 573, 580 n. 13, 100 S.Ct. 1371, 1377 n. 13, 63 L.Ed.2d 639, 647 n. 13 (1980), quoting Payton v. State, 45 N.Y.2d 300, 310-11, 408 N.Y.S.2d 395, 399, 380 N.E.2d 224, 229 (N.Y. App. Div. 1978), rev'd and remanded, Payton, supra.

18/ The decision below observed, "[T]he [Sabo] court judicially noticed the unique capabilities of the helicopter as compared to fixed-wing aircraft" (J.A. 132), then proceeded to quote Sabo out of context for that exact proposition. Id. at 132-33. The decision below in fact, never did say what Sabo had actually judicially noticed: "We judicially notice the unique capabilities of the helicopter (continued...)

capabilities that make them indispensible to modern law enforcement. E.g., id.[19] Their uses are as varied as the agencies which use them.[20] The FBI, INS, DEA, Coast Guard, Border Patrol, Secret Service, and other federal law enforcement agencies' utilization of helicopters vary with specific agency missions.

If law enforcement does not combat crime by utilizing to the fullest at least that technology which is both visible and audible to its target (as is a helicopter), society will be overwhelmed by increasingly sophisticated criminals. "Hign-tech" marijuana cultivation in greenhouses is one example of this increasing sophistication.[21]

The practical law enforcement issue at stake in this case is the degree to which we must surrender in the war on drugs.

18/ (...continued)
to gambol in the sky -- turning, curtsying, tipping, hummingbird-like suspended in space, ascending, descending and otherwise confounding its fixed-wing brethren doomed to fly straight, turn in caution and glidingly descend." People v. Sabo, 185 Cal. App. 3d 845, 230 Cal. Rptr. 170, 175 (Cal. 4th Dist. Ct. App. 1986), cert. denied sub nom. California v. Sabo, ___ U.S. ___, 107 S.Ct. 2200, 95 L.Ed.2d 855 (1987).

19/ See Brief of Amicus Curiae Airborne Law Enforcement Association, Inc. filed this week in this case.

20/ Police helicopters have been used for aerial surveillance operations since the late 1940s by the New York Police Department and the Los Angeles Sheriff's Department. E.g., McGowan, Police Helicopters, supra, at 11. By the time of the Korean War, helicopters had undergone substantial evolutionary change. The Vietnam War dramatically underscored the helicopter's "new credentials as a multi-purpose tool -- a tool that began to attract the attention of law enforcement." Id. "While there was considerable fad-buying [by police departments] of helicopters during the mid-1960s, it wasn't until the end of the decade that the era of police airborne patrols dawned." Id.

21/ See, e.g., Pot Growers Go Indoors, Officials Say, Richmond (In.) Palladium-Item A7 (Mar. 27, 1988) (AP). "Marijuana growers are using sophisticated artificial lighting systems, scientific irrigation techniques, and up-to-date horticultural practices to boost their per-plant marijuana production and their odds of escaping surveillance by police in the air." Id.

How the United States (including Florida) deals with marijuana cultivation in its own backyard (including what the Florida Supreme Court seemed to think was Riley's backyard) is of no small moment to a state like Florida, which is awash in illegal drugs.22/ In Florida's view, the United States and the several states have an obligation, consistent with constitutional requirements, to use helicopters and airplanes for just such aerial surveillance.23/

22/ A Domestic War, Too: Fight Against Drugs, Miami Herald at 14A (Apr. 27, 1988) (editorial).

23/ Florida, as one of the United States, has obligations to enforce this country's treaty obligations to eradicate drugs. E.g., Single Convention on Narcotic Drugs, 1961, Done at New York March 30, 1961, entered into force with respect to the United States, June 24, 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151; Amendment to Single Convention on Narcotic Drugs, 1961, Protocol done March 25, 1972, entered into force with respect to the United States, Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 4.

The Florida Supreme Court, rather than engaging in reasoned analysis under the Fourth Amendment, simply injected perjoratives to castigate helicopters' use by law enforcement agencies. J.A. 132. To be sure there may be exceptions to the general bright line rule urged here, in cases where police aerial observations are made in a deliberately harassing manner or, possibly, if there is physical intrusion.24/ But if abuse should occur in use of helicopters for aerial

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24/ While "it is certainly possible that helicopter surveillance could be unreasonably intrusive on account of interminable hovering, raising clouds of dust, creating unreasonable noise, and so forth, nothing in the record indicates that any such factor was present in this case." California v. Sabo, ___ U.S. ___, ___, 107 S.Ct. 2200, 2201, 95 L.Ed. 2d 855, 856 (1987) (White, J., joined by the Chief Justice, dissenting from denial of certiorari). For other possible abuses of the general right to use aerial observations from legal vantage points, see Giancola, supra, 830 F.2d at 550-51; NORML v. Mullen, supra; and United States v. Broadhurst, supra.

observations, the abuse is visible. The helicopter is not a secret technology where neither its use nor abuse is generally known.

In any case, there is no showing of abuse here. Despite the Florida Supreme Court's references to "hovering," the helicopter circled the greenhouse only twice. There is no indication it disturbed Riley's property in any fashion.[25] Neither is there any indication in the record of any other conduct which might be deemed harassing.

25/ This flight was at 400 feet. In Giancola v. State of West Virginia Department of Public Safety, 830 F.2d 547 (4th Cir. 1987), the plaintiff claimed "the helicopters flew over his property . . . at an altitude of 100 feet" but "admitted that the wind generated by the rotors did not disrupt anything on the ground." 830 F.2d at 548. This suggests why a flight at 400 feet could not create any hazard to persons or property on the surface.

2. None Of The Specific Limitations Suggested By The Florida Supreme Court On Aerial Observation Has Any Constitutional Significance.

In addition to its general objection to helicopters, both as a platform of aerial observation and as a different platform of aerial observation, the Florida Supreme Court objected to helicopter use on the bases that the observation was from too low an altitude and was the result of a "targeted" flight, i.e., a flight to the airspace over Riley's property to look through the open roof panels and open sides of his greenhouse at his 6-12 foot high marijuana plants.

a. Any Limitation On Helicopter Observation Based On Definitions Of "Navigable Airspace" Is Irrational.

The first of the two specific objections raised by the Florida Supreme Court was that the helicopter here flew below the level at which a fixed-wing airplane may lawfully fly. That is incontestible, but it is equally incontestible the pilot was where he lawfully could be. E.g., 14 C.F.R. § 91.79(d); accord, J.A. 133.

The Florida Supreme Court held the helicopter here flew outside of (that is, below) "navigable airspace." This phrase comes from 49 U.S.C. § 1304, which provides, in relevant part, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of

freedom of transit through navigable airspace of the United States."26/

Both the decision below (and the California court Sabo decision on which it relied) put great store in the fact that the aerial observation upheld in Ciraolo and Dow was performed in "navigable airspace." The decision below introduced this concept through the back door: the helicopter here was assertedly in "non-navigable" airspace, which is then defined, and shown for that reason to fall outside the ambit of Ciraolo and Dow (i.e., as a matter of constitutional law). Hence, after noting the facts in Sabo were "nearly identical to those here," (J.A. 131- 32), the decision below observed, "Noting that helicopters may lawfully be operated in nonnavigable airspace, the [Sabo] court

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26/ 49 U.S.C. § 1301(29) and 14 C.F.R. § 91.79 are set forth in text, supra.

concluded that such lawful operation did not fall within the aerial surveillance approved in Ciraolo and Dow Chemical." J.A. 132 (emphasis added).

In an accompanying, explanatory footnote the Florida Supreme Court explained the statutory and regulatory source for the Sabo distinction:

> The Sabo court relied on federal law defining navigable airspace as that airspace above the minimum altitudes of flight prescribed by the regulations of the Civil Aeronautics Board. 49 U.S.C. §§ 1304, 1301(29). The minimum altitude for a fixed wing aircraft is 1,000 feet over a congested area and 500 feet over a noncongested area. 14 C.F.R. § 91.79(b) & (c) (1986). Helicopters may be lawfully operated at less than minimum altitudes, and therefore below navigable airspace, so long as the operation is conducted "without hazard to persons or property on the surface." 14 C.F.R. Section 91.79(d) (1986). 230 Cal. Rptr. at 174-75.

J.A. 132 n. 10.

For purposes of argument, we may assume the threshold premise that "navigable airspace" is, as a matter of grammar, always above the minimum altitude, since federal statute declares "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301(29). Since a helicopter, unlike an airplane, has no fixed minimum altitude under the regulations construed in the decision below, a helicopter will always be doomed under this reading to fly in nonnavigable airspace unless it happens to fly at altitudes where airplanes (but not helicopters) are required to fly.

Ciraolo and Dow mentioned the phrase "navigable airspace" in the course of stating where the fixed-wing aircraft there involved

were located. Since fixed-wing aircraft must fly in "navigable airspace" they were in a place where they had a lawful right to be and the relevance of "navigable airspace" to those cases was establishing the lawfulness of the placement of the vantage point there.

Simple analysis of the regulations considered in the decision below shows they cannot and do not apply to helicopters. Title 14 C.F.R. § 91.79(d) explicitly states that helicopters may be operated at less than the minimum altitudes otherwise prescribed "if the operation is conducted without hazard to persons or property on the surface." Further, 14 C.F.R. § 135.203 provides:

> Except when necessary for takeoff and landing, no person may operate under VFR --...(b) A helicopter over a congested area at an altitude less than 300 feet above the surface.

It is thus not a case of the FAA regulations ignoring helicopters. Rather the regulations set safety rules for where helicopters may lawfully be which are different than those set for fixed-wing aircraft, presumably to reflect the different characteristics of the two kinds of aircraft.

There is thus no structural basis for an "altitude" test. Neither is there any evidence (or allegation) that this helicopter violated the FAA prohibition against creating a surface hazard to person or property. The helicopter here being where it was legally entitled to be, Ciraolo's public vantage point test was met.

b. Any Limitation On Aerial Observation Based On Whether The Observation Is Purposeful, "Targeted", On A Specific Destination As Opposed To Casual, Has No Legal Basis.

The second of the two specific objections raised by the Florida Supreme Court was that this helicopter flight was not "casual" but was "purposeful" ("targeted") on Riley's greenhouse.[27] A

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[27] The Florida Supreme Court distinguished from the "purposeful" flight (J.A. 130) the aircraft "casually flying over the area," (J.A. 133) citing the decision in "Ciraolo, 106 S.Ct. at 1813." See J.A. 133. This phrase may be derived from the words "[a]ny member of the public flying in this airspace who glanced down." At note 2 on that page, the Ciraolo court distinguished between "a 'routine patrol'" and "'focused' observations," addressing the dissent's argument that the former is constitutionally permissible and the latter not with respect to curtilage, and rejecting that argument. Florida here interprets the words "casual" and "routine" to be essentially the same; likewise Florida treats "purposeful," "focused," and "targeted" to be synonymous.

"casual" flight presumably is one for a purpose other than observance of crime, such as traffic patrol (albeit some cases refer to a "routine patrol" and "routine flyovers" to mean something else again). If this distinction, suggested by the dissenting opinion in Ciraolo[28] as having significance, were applied in a rural area (such as that part of Pasco County, Florida- - itself a Florida county with a rather small population -- here involved), then little police aerial observation would be possible, there being little traffic to patrol.

No decision of this Court validates different treatment of "purposeful" observations and observations made during

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[28] See generally Ciraolo, supra, 476 U.S. at 215, 106 S.Ct. at 1814, 90 L.Ed.2d at 218 (1986) (Powell, J., joined by Brennan, Marshall, and Blackman, JJ., dissenting).

"casual" patrols. Ciraolo flatly rejected the distinction.

Nor does logic validate a distinction between the two kinds of observation. The Florida Supreme Court raised this bright line ("purposeful" as opposed to "casual") in the context of Riley's objectively reasonable expectations of privacy. But from the viewpoint of Riley's expectations, why the aircraft appeared overhead seems irrelevant. As Ciraolo observed,

> Whether this is a rational distinction is hardly relevant, although we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes [or two helicopters] pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

Ciraolo, supra, 476 U.S. at 214 n. 2, 106 S.Ct. at 1813 n. 2, 90 L.Ed.2d at 217 n. 2 (brackets added).

Certainly a "purposeful" observation is more likely to have a successful result than the casual one. One is likely to be inclined to see that which one is focusing on more readily than something one observes merely in passing.29/ But that tells us

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29/ Florida does not concede here, even for purposes of argument, that "the details observed here. . . " (J.A. 133), could not just as easily have been discerned by any person casually flying over the area in a fixed-wing aircraft. There are three reasons for this refusal: First, because the 6-12 foot marijuana plants were conspicuous through the gaping holes left by missing panes in the roof of the greenhouse and through the open-air sides; Second, because there is no evidence in the record of any hovering, it is highly probable that a fixed-wing aircraft at 100 feet higher altitude (assuming the rural "noncongested area" minimum altitude of 500 feet would have applied) would have seen the same things the helicopter observer saw from 400; Third, an officer as equally experienced as Deputy Gell in a fixed wing aircraft flying even at 1,000 feet in an equally targeted flyover probably also

(continued...)

very little. If, on a "casual" flight the passing gaze of a policeman comes upon a greenhouse with part of its roof and two of its sides open to the air, assuredly he will "target" his gaze on the exposed interior. Does this "targeting" of gaze make the observation unlawful? To answer in the affirmative would deny, and destroy, reality. The distinction simply has no logical, or constitutional, basis.30/

29/ (...continued)
could have seen the 6-12 foot plants below and recognized the plants for what they were. Cf., e.g., Blalock, supra, 483 N.E.2d 439, 441, 443 (where police in airplane saw marijuana through translucent roof of greenhouse from 800-1000 feet; "plane was being used for routine flyovers of [rural c]ounty to detect marijuana crops.").

30/ "That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant." Ciraolo, supra, 476 U.S. 207, 106 S.Ct. at 1813, 90 L.Ed.2d at 217.

c. Concepts Of Curtilage Have Little Relevance As to Aerial Observations And In Any Case Should Not Constitute A General Limitation On Them.

Whatever its relevance, the Florida courts operated on the assumption the greenhouse was part of Riley's curtilage and supported their conclusion that Riley showed a subjective expectation of privacy from warrantless aerial observation by reference to curtilage. Riley recently went so far as to claim curtilage "completely remove[s] the case sub judice from the situation in Ciraolo."31/

31/ Respondent's Brief in Opposition to Petition for Certiorari (at 8), Florida v. Riley, ___ U.S. ___, 108 S.Ct. 1011, 98 L.Ed.2d 977 (1987). On the other hand, in his brief in the Florida Supreme Court, Riley described the "aerial search" here as being "very similar" to that in People v. Ciraolo, 161 Cal. App. 3d 1081, 208 Cal. Rptr. 93 (Cal. 1st Dist. Ct. App.
(continued...)

The relevance of curtilage to aerial observation is dubious. Ciraolo ignored the suburban backyard (fully and immediately fenced, containing a swimming pool and sundeck), and determined the issue is what the eye can observe, not the place observed.[32] Its existence in this case is, at best, problematical. The fact patterns in the various cases (including all those listed in notes 14 and 15, supra) and the economics of marijuana production

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[31] (...continued)
1984), rev'd, Ciraolo, supra. Brief of Petitioner (at 6), State v. Riley, 511 So.2d 282 (Fla. 1987).

[32] As the dissenters in Ciraolo there pointed out, "The Court omits any reference to the fact that respondent's yard contained a swimming pool and a patio for sunbathing and other private activities. At the suppression hearing, respondent sought to introduce evidence showing that he did use his yard for domestic activities. The trial court refused to consider that evidence." Ciraolo, supra, 476 U.S. at 222 n. 7, 106 S.Ct. at 1817 n. 7, 90 L.Ed.2d at 222 n. 7 (Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (record citation omitted).

in the United States, show the relatively small production units of such cultivating operations cannot obscure their business nature. The norms associated with the sanctity of the home and the legitimacy of an assertion of privacy expectations surely do not obtain in modern commercial farming (whether cattle, citrus, dairy, or marijuana).[33] The core of the Framers' agrarian context of hearth and home in protecting the curtilage at common law surely did not extend to the kind of greenery at stake here. The box row hedges of Williamsburg and Gunston Hall and the humble ramshackle scrapple of a prairie garden where the pioneer woman raised vegetables

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[33] Cultivation of crops is not an intimate activity of the kind protected by the Fourth Amendment. "There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Oliver v. United States, 466 U.S. at 179, 104 S.Ct. at 1741, 80 L.Ed.2d at 222.

for truly "domestic" consumption -- and the privacy expectations thereto attached-- have nothing to do with marijuana production for profit.

The latest decision of this Court bearing on curtilage is United States v. Dunn, ___ U.S. ___, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)[34/] and application of Dunn's four-part test to this "greenhouse"[35/] casts grave doubt on characterization of it as curtilage. This case involves an over-five acre parcel rented on a verbal lease, having a (probably incomplete) perimeter net wire fence. The greenhouse for marijuana cultivating operations was

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34/ While the Florida Supreme Court cited Justice Brennan's dissent in United States v. Dunn, ___ U.S. ___, ___, 107 S.Ct. 1134, 1142, 94 L.Ed.2d 326, 338 (1987), it did not mention or consider this Court's opinion nor Justice Scalia's concurrence.

35/ It is not even clear the exposed-to-the-air-on-two-sides shed rises to a dictionary definition of a "greenhouse."

built by the cultivator, who resided nearby in a mobile home. Facially, these facts would suggest a business enterprise tended by its operator and manager, who lived on the business premises. Although the operation was of a cottage industry type, no less is it a business.

Further as Justice Scalia, concurring in United States v. Dunn, noted, "What is significant is that the barn was not being so used [for intimate activities of the home], whether or not the law enforcement officials knew it."[36/]

36/ United States v. Dunn, ___ U.S.___, ___, 107 S.Ct. 1134, 1141, 94 L.Ed.2d 326, 337 (1987) (Scalia, J., concurring) (emphasis and brackets added) (original context preserved).

E. Neither The Framers' Constitution, Justice Harlan's Constitution, Nor the "Living Constitution" Prohibits The Articulation Of The Requested Bright Line Rule.

As this Court has often explained, "Earlier [i.e., pre-Katz] law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects."37/ Given the Framers' view of physical invasions, the Framers would have presumably had no theoretical objection to warrantless naked-eye aerial observation -- no matter what the airborne vehicle.

37/ E.g., Payton v. State, 445 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978), rev'd and remanded sub nom. Payton v. New York, 445 U.S. 573, 591 n. 33, 100 S.Ct. 1371, 1382 n. 33, 63 L.Ed.2d 639, 654 n. 33 (1980) (citing Olmstead v. United States, 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed.2d 944 (1928)). There is no suggestion here that any invasion of any physical property of Riley here occurred, nor could there be.

Under our "Living Constitution" concepts of "trespass" and Fourth Amendment interpretation have diverged. This Court has found no violation of the Fourth Amendment even where a trespass is concerned. E.g., Oliver v. United States, supra. Similarly, this Court found, in Katz, that even where no trespass had occurred, there still may be a Fourth Amendment violation. Katz, of course, stretched "the prohibitions of the [Fourth] Amendment. . . to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him."38/

For two decades Justice Harlan's seminal concurrence in Katz has been the foundation of Fourth Amendment thinking and scholarship. There is now an intellectual struggle among proponents and opponents of warrantless

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38/ Payton, supra, 445 U.S. at 591 n. 33, 100 S.Ct. at 1382 n. 33, 63 L.Ed.2d at 654 n. 33 (citing Katz, supra).

aerial observation to claim his concurring opinion vindicates one position or the other. The Florida Supreme Court decision here is one more such case. Ciraolo likewise purports to follow Katz, although it reaches the opposite historical conclusion from the decision below, and in terms far more persuasive. Perusal of Justice Harlan's concurring opinion in Katz confirms the Ciraolo majority's reading thereof:

> The dissent contends that the Court ignores Justice Harlan's warning in his concurrence in Katz v. United States, 389 U.S., at 361-362, 88 S.Ct., at 516-517, that the Fourth Amendment should not be limited to proscribing only physical intrusions onto private property. Post, at 215-216. But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications, see Katz, supra, at 362, 88 S.Ct., at 517, were plainly not aimed at simple visual observations from a public place. . . .
>
> Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft -- or by a power company repair mechanic on a pole overlooking the yard. . . .
>
> . . . .
>
> One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy.

Ciraolo, supra, 476 U.S. at 214-15, 106 S.Ct. at 1813, 90 L.Ed.2d at 217-218.

Helicopters have been in use since the first quarter of this century and have been in active law enforcement and police aerial observation use since the 1940s. There is then no plausible way to claim Katz or Justice Harlan's concurrence therein remotely cast into doubt the general

constitutionality of police warrantless aerial observation. Analysis in terms of a "Living Constitution" likewise permits a bright line test for permissible warrantless naked-eye aerial observations.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be reversed and the cause remanded to the Florida courts for further proceedings.

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